

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

MAGTEN ASSET MANAGEMENT CORP.	)	
and LAW DEBENTURE TRUST COMPANY	)	
OF NEW YORK,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 04-1494-JJF
	)	
NORTHWESTERN CORPORATION,	)	
	)	
Defendant.	)	
	)	
<hr/> MAGTEN ASSET MANAGEMENT CORP.,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No. 05-499-JJF
	)	
MIKE J. HANSON and ERNIE J. KINDT,	)	
	)	
Defendants.	)	
<hr/>	)	

**REPORT AND RECOMMENDATION OF SPECIAL MASTER  
WITH RESPECT TO CERTAIN DISCOVERY MOTIONS  
FILED BY PLAINTIFFS AND DEFENDANTS**

1. On February 8, 2006, the Honorable Joseph J. Farnan, Jr. appointed me to serve as Special Master in the above-referenced actions.

**The Pending Motions**

2. The Motions presently pending before me are as follows:

A. Plaintiffs' Emergency Motion Seeking Orders (a) Shortening the Briefing Schedule under Local Rule 7.1.2 and Setting a Hearing Date Before the Special Master; (b) Determining Privilege Status of Documents Northwestern Seeks to Recall Under Claim of Inadvertent Production and Privilege; (c) Compelling Northwestern to Produce Non-Privileged Documents; (d) Compelling Northwestern to

Produce Legible Versions of Documents Produced in Illegible Form; (e) Extending the Period for Completing Depositions; and (f) Assessing Fees and Costs Against Northwestern (“Plaintiffs’ Emergency Motion Seeking Orders, etc.”).

B. Emergency Cross-Motion of Defendant Northwestern Corporation for an Order Truncating the Normal Briefing Schedule Under Local Rule 7.1.2 and Setting an Immediate Telephonic Hearing and for an Order that Plaintiffs and Their Counsel Immediately Comply With Their Obligations Pursuant to Paragraph Eight of the Stipulated Protective Order of March 21, 2007 (“Emergency Cross-Motion of Northwestern, etc.”).

C. Joint Motion of Defendants Northwestern Corporation, Michael J. Hanson, and Ernie J. Kindt for a Protective Order Pursuant to Fed.R.Civ.P. 26(c) and Local Rule 30.2.

D. Motion of Magten Asset Management Corporation for a Protective Order with Respect to the Deposition of Talton R. Embry.

### **Introduction**

3. On May 2, 2007, Judge Farnan advised me that he was referring the above-referenced Motions to me for decision.

4. Consistent with the Court’s direction to me, I heard oral argument on the pending motions on May 18, 2007, beginning at 10:00 A.M. and concluding at 5:00 P.M.

5. As a prelude to the oral argument that was to be presented by the parties on May 18, 2007, I wrote to the parties on May 17, 2007 and identified ten issues that were raised by the Motions listed above in paragraph 2 and the order in which they

would be addressed during the oral argument on May 18. The May 17, 2007 letter ("the May 17 agenda letter") to counsel for the parties is attached hereto as Exhibit A.

6. Because of the time constraints facing the parties in view of the Rule 16 Scheduling Order in this action, I advised the parties that with respect to some of the issues identified in the May 17 agenda letter, I expected to provide Bench Rulings in order to expedite the discovery process. However, I also indicated that the complexity of other issues required that I take them under advisement and that I would issue further rulings with respect to those issues after the oral argument and after supplemental submissions by the parties.

7. This Report and Recommendation incorporates by reference the Bench Rulings that were made during the hearing on May 18. *See* Exhibit B hereto.

8. The issues that I decided during the course of the hearing on May 18 are as follows:<sup>1</sup>

- A. 1. With respect to Plaintiffs' Emergency Motion Seeking Orders, etc., and the Emergency Cross-Motion of Defendant Northwestern, etc., whether Northwestern has waived privilege with respect to the documents that Northwestern produced to Plaintiffs or whether the production was inadvertent or privilege was otherwise not waived;
- B. 2. With respect to the parties' motions referenced in paragraph 1 above, whether Plaintiffs are immediately required to return the documents or destroy the documents that are alleged to have been produced inadvertently or whether Plaintiffs can retain them until their privileged status is resolved;
- C. 6. With respect to the Plaintiffs' motion referenced in paragraph 1 above, whether Northwestern should be

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<sup>1</sup> The numbered paragraphs in subparagraphs A through G are incorporated verbatim from the May 17 agenda letter, Exhibit A hereto.

required to produce certain documents in another electronic format;

- D. 7. The Joint Motion for Protective Order filed by Northwestern and Messrs. Hanson and Kindt as to certain depositions noticed by Plaintiffs;
- E. 8. Magten's Motion for Protective Order with respect to the deposition of Talton R. Embry;
- F. 9. Plaintiffs' motion to exceed the ten deposition limit and to extend the discovery schedule for the taking of depositions in this action; and
- G. 10. Whether sanctions should be imposed with respect to any of the motions addressed in paragraphs 1 through 8 above.<sup>2</sup>

**Plaintiffs' and Northwestern's Motions Concerning the Inadvertent Production of Allegedly Privileged Documents**<sup>3</sup>

9. The genesis of these applications relates to Northwestern's assertion that on or about April 3, 2007, allegedly as a result of lawyer error, it had produced, inadvertently, privileged documents to Magten as part of the document production process in the case. According to Northwestern, the discovery on April 3 of the inadvertent disclosure of a document that, in its view, was quite clearly protected by the attorney-client privilege, triggered an extensive review of the documents that had been previously produced to Magten. As a result of that review, Northwestern notified Magten during the course of April that it had produced other privileged documents inadvertently.

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<sup>2</sup> No sanctions were issued as part of the Bench Rulings that are the subject of this Report and Recommendation.

<sup>3</sup> Issues number 1 and 2 in the May 17 agenda letter (Exhibit A hereto) were raised in Plaintiffs' Emergency Motion Seeking Orders, etc. and the Emergency Cross-Motion of Defendant Northwestern, etc.

10. In connection with Northwestern's allegation that it had produced documents inadvertently to Magten, it advised Magten that it was invoking its rights for the return or destruction of those privileged documents in accordance with paragraph 8 of the Stipulated Protective Order entered by the Court on March 21, 2007, which states as follows:

Inadvertent production of documents subject to work-product immunity, the attorney-client privilege or other legal privilege protecting information from discovery shall not constitute a waiver of the immunity or privilege, provided that the producing party shall promptly notify all receiving Parties in writing of such inadvertent production. Upon reasonable notice, such inadvertently produced documents and all copies thereof, as well as all notes or other work product reflecting the contents of such materials, shall be returned to the producing party or destroyed, upon request, and such returned or destroyed material shall be deleted from any litigation-support or other database. No use shall be made of such documents during any deposition, mediation, hearing or trial, nor shall they be shown to anyone who was not given access to them prior to the request to return or destroy them. The receiving party then may move the Court for an order compelling production of the material, but such motion shall not assert as a ground for entering such an order the fact or circumstances of the inadvertent production.

11. Plaintiffs argued that paragraph 8 of the Stipulated Protective Order did not support Northwestern's position because, in their view, paragraph 8 required a determination by me, as a threshold matter, as to whether the documents were produced inadvertently. Such an interpretation of paragraph 8, in Plaintiffs' view, required an examination of the traditional factors, recognized in this court and elsewhere, as part of the common law (and now codified in Fed.R.Civ.P. 26(b)(5)(B)), that are used to determine whether privileged communications have been produced inadvertently. These factors include: (a) the number of privileged documents produced inadvertently in comparison to the total document production; (b) the procedures used by the producing

party to screen documents for privilege; (c) the amount of time that elapsed between the time of production of the documents and the discovery that they had been produced inadvertently; and (d) upon discovery of the inadvertent production, how quickly the party sought their return. *See, e.g., Helman v. Murry's Steaks, Inc.*, 728 F. Supp. 1099, 1104 (D. Del. 1990).

12. Plaintiffs argued that even though the parties took the trouble to negotiate a provision specifically to deal with inadvertent production, that the provision did not provide any additional protection for inadvertently produced documents than was provided by Rule 26(b)(5)(B), except that paragraph 8 did not permit the party in receipt of the allegedly privileged documents to sequester them (rather than return or destroy them) pending a decision on whether the production was inadvertent. Yet, Plaintiffs had not returned or destroyed the privileged documents at the time of the May 18 hearing.

13. For the reasons set forth in my Bench Ruling of May 18, 2007 at Page 54, Line 24 through Page 58, Line 1, which is incorporated by reference as if fully set forth herein, I conclude that the actions taken by Northwestern were protected by Paragraph 8 of the Stipulated Protective Order. As indicated in the Bench Ruling, the inadvertent production provision in the Stipulated Protective Order in this case is a much broader and more liberal form of such protection than is often used in other cases. For example, it is not unusual in these types of "pull-back" or "claw-back" provisions to limit the time in which the parties are permitted to require the return of inadvertently produced documents without a dispute concerning whether the production was inadvertent or not.

14. Other forms of pull-back provisions have also set time periods but based on the discovery of the inadvertent production as opposed to the date of the

inadvertent production. The parties in the pending actions may have chosen not to include time periods within paragraph 8 of the Stipulated Protective Order because by the time the Stipulated Protective Order was entered on March 21, written discovery was to have concluded on March 16, 2007. In any event, as reflected in the above-referenced Bench Ruling, Plaintiffs' reading of paragraph 8 of the Stipulated Protective Order, and similar "pull-back" and "claw-back" orders would render them mere nullities. The entire reason for using provisions like paragraph 8 of the Stipulated Protective Order is to avoid wasteful litigation as to whether the disclosure of an allegedly privileged document was inadvertent or not. Having seen the documents, Plaintiffs can proceed to the merits and challenge Northwestern's designation of certain documents as privileged.

**Plaintiffs' Motion to Require Northwestern to Produce  
Certain Documents in a Different Electronic Format**<sup>4</sup>

14. The focus of this dispute is that Northwestern has produced electronic documents, primarily Excel spreadsheets, amounting to approximately 300,000 pages in a TIFF format to Plaintiffs. An Excel spreadsheet, when viewed in a TIFF or PDF image, or when printed, appears quite differently than when viewed on a computer in its "native" format. A document that is in Excel format and is approximately ten pages, could amount to several hundred pages when printed or viewed on a computer in TIFF or PDF. Further, when viewed in TIFF or PDF format, the organization of the cells of information that one normally views on a single page in Excel, may be strewn over scores of pages in the TIFF or PDF format or when printed.

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<sup>4</sup> This issue appears in paragraph 6 in the May 17 agenda letter, attached hereto as Exhibit A.



15. Plaintiffs, upon receiving the documents in the TIFF format, requested that certain of the approximately 3,200 Excel spreadsheets be electronically converted to a TIFF format that would have the same appearance as an Excel spreadsheet, but would not be in the “native” format that would permit a party to change the information in the document or to view the metadata that would explain to a party how the document was created. Northwestern cooperated with these requests and has produced several score of these reconfigured Excel spreadsheets in a readable TIFF format.

16. Notwithstanding the cooperation between Plaintiffs and Defendant Northwestern on this discovery issue, Plaintiffs requested that Northwestern produce all 3,200 spreadsheets in a TIFF format that could be read as an Excel spreadsheet, a request that would require Northwestern to spend weeks to reconfigure all such spreadsheets at substantial expense. In fairness to Plaintiffs, the request for the 3,200 documents came as a result of a breakdown in the parties’ cooperation until that point on the production of the reconfigured Excel spreadsheets on an ad hoc basis as requested by Plaintiffs. It is obviously too burdensome and expensive, and also in all likelihood totally unnecessary, for Plaintiffs to have readable copies of all 3,200 Excel spreadsheets that have been produced by Northwestern.

17. Accordingly, I incorporate herein by reference as if fully set forth herein my Bench Ruling at Page 247, Line 24 through Page 250, Line 7. This Order essentially requires the parties to cooperate and Plaintiffs to be permitted to request the production of reconfigured Excel spreadsheets in a readable TIFF format, subject to the



right of Northwestern to apply to the Court or to the Special Master to the extent that such requests are alleged to become unduly burdensome.

**The Joint Motion for Protective Order Filed by  
Defendant Northwestern and Defendants Hanson and Kindt  
As to Certain Depositions Noticed by Plaintiffs<sup>5</sup>**

18. The essential nature of the Motion for Protective Order filed by Messrs. Hanson and Kindt and Northwestern relates to where the depositions of Defendants Hanson and Kindt and employees of Northwestern (including a Rule 30(b)(6) witness) should be taken.

19. On the one hand, the moving Defendants argue that the traditional rule is that individual defendants or corporate defendants should be deposed in the jurisdiction in which the individual defendants reside or work, and in the case of a corporate defendant in the jurisdiction where its principal place of business is located.

20. On the other hand, Plaintiffs argue that the depositions in question should be conducted in Delaware (or if the parties were to agree, in New York where the majority of counsel are located who represent the parties in the action). The rationale for this argument is that Northwestern voluntarily elected to file its bankruptcy case in the Bankruptcy Court in Delaware. Additionally, Defendants Hanson and Kindt, whom Magten had sued originally in Montana Federal Court, had successfully requested the Montana Federal Court to transfer their case to Delaware where Magten had filed other related actions, including the adversary against Northwestern.

21. The issue then becomes one of balancing equities between the traditional deference given to deponents who are defendants in an action to be deposed in

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<sup>5</sup> This discovery issue was identified in paragraph 7 of the May 17 agenda letter, Exhibit A hereto.

the jurisdiction in which they reside or have their principal place of business and the policy considerations attendant to the fact that Northwestern, Hanson and Kindt all elected to have their rights adjudicated in the Federal Court or Bankruptcy Court in this state.

22. My Bench Ruling, reflected at Page 232, Line 13, through Page 235, Line 4, and incorporated by reference as if fully set forth herein, ordered that the depositions of Hanson, Kindt and the Northwestern employees be taken in Sioux Falls, South Dakota, which is the principal place of business of Northwestern.<sup>6</sup>

23. The Magten argument that Northwestern, Hanson and Kindt all elected to litigate the present actions in Delaware is not persuasive. While it is true that Northwestern filed its bankruptcy action in Delaware, it is not entirely accurate to suggest that by doing so it waived whatever its rights might be when it became the defendant in the adversary actions that are often ancillary features of bankruptcy filings.

24. Furthermore, in the case of Hanson and Kindt, the action filed against them in Montana was not an adversary bankruptcy proceeding at all. It was filed in the United States District Court in Montana and was transferred to Delaware only because the defenses that Hanson and Kindt would be asserting would be closely connected with the defenses that Northwestern would raise in connection with the adversary proceeding brought by Plaintiffs against it in Delaware.

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<sup>6</sup> Mr. Kindt is no longer an employee of Northwestern and is a resident of Montana. Under the Federal Rules of Civil Procedure, Magten could not compel him to appear for a deposition in Delaware under any theory. However, Mr. Kindt has agreed to appear for his deposition in Sioux Falls, along with four other employees of Northwestern whom Magten has decided to depose.

25. Also, Hanson is currently the Chief Executive Officer of Northwestern. Northwestern is engaged in a transaction to sell the company, the consummation of which is imminent. Accordingly, I give this factor some weight in my decision that Hanson be deposed in Sioux Falls to avoid any disruption to such a significant economic development for the company. Lastly, it is important to note that, prior to the breakdown of efforts to agree among the parties as to locations for these depositions, there was a tentative agreement that these witnesses and certain non-parties would be deposed in Minneapolis if the scheduling for the witnesses and attorneys so permitted. Because of scheduling difficulties for a cluster of depositions in Minneapolis, that alternative did not work and led to the motion practice that is the subject of this decision. Sioux Falls is only one hour by air from Minneapolis. Thus, it is no great hardship to counsel for Plaintiffs to travel to that city.

**Magten's Motion for Protective Order  
With Respect to the Deposition of Talton R. Embry<sup>7</sup>**

26. At the hearing on May 18, the parties indicated that they believed they could resolve any disputes concerning the timing and location of Mr. Embry's deposition. See Bench Ruling at Page 199, Line 21, through Page 201, Line 4, which is incorporated by reference as if fully set forth herein.

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<sup>7</sup> This issue appears as paragraph 8 in my letter of May 17, 2007, attached as Exhibit A hereto.

**Plaintiffs' Motion to Exceed the Ten Deposition Limit  
and to Extend the Discovery Schedule  
for the Taking of Depositions in this Action<sup>8</sup>**

27. By this Motion, Plaintiffs sought to increase the number of depositions permitted by the Rule 16 Scheduling Order from ten to approximately fourteen and to also extend the time for the taking of depositions in the case beyond the May 2, 2007 cutoff for fact depositions.

28. Plaintiffs argued that as a product of the review of written discovery in the action, the lack of knowledge of certain deponents whom they had deposed (one deponent asserted the Fifth Amendment right against self-incrimination in response to all questions during a deposition), they needed to exceed the ten deposition limit permitted to each side in the Rule 16 Scheduling Order. Significantly, Plaintiffs also emphasized that they could not realistically hope to complete all of the depositions they sought before May 2, 2007, the cutoff date for fact deposition discovery, because of the motion practice relating to the dispute among the parties concerning privileged communications that the Plaintiffs had challenged.

29. For their part, Defendants argued that to a great extent the delay in taking the depositions was a function of Plaintiffs' lack of diligence and a more general concern that the fact deposition cutoff date should not be extended because of the potential domino effect it could have with respect to other dates in the case schedule relating to expert depositions, dispositive motions, and trial.

30. I determined at the hearing on May 18 that Plaintiffs had demonstrated good cause with respect to both of their applications for additional

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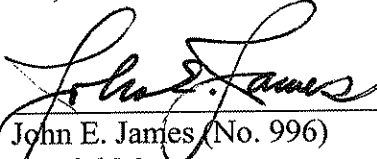
<sup>8</sup> The issues raised by this motion are identified in paragraph 9 of the May 17 agenda letter, Exhibit A hereto.

depositions, as well as for an extension of the discovery cutoff date. Accordingly, as reflected in the Bench Ruling that appears at Page 191, Line 21, through Page 199, Line 7, each side will be permitted to take 15 depositions and the revised fact deposition cutoff date will be moved from May 2 until June 30, 2007.

31. In subsequent Report(s) and Recommendation(s), I will address the three issues taken under advisement, which are identified in paragraphs 3 through 5 of the May 17 agenda letter, Exhibit A hereto.

32. This Report and Recommendation will become a final order of the Court unless objection is timely taken in accordance with the provisions of Fed.R.Civ.P. 53(g).

IT IS SO ORDERED this 1<sup>st</sup> day of June, 2007.

  
John E. James (No. 996)  
Special Master

cc: The Honorable Joseph J. Farnan, Jr.  
Dale R. Dube, Esquire  
Victoria Watson Counihan, Esquire  
Denise Seastone Kraft, Esquire

798845/30048-001

# EXHIBIT A



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May 17, 2007

**By Hand and By E-Mail**

Dale R. Dube, Esquire  
Blank Rome LLP  
Chase Manhattan Center – Suite 800  
1201 North Market Street  
Wilmington, DE 19801

Victoria Watson Counihan, Esquire  
Greenberg Traurig LLP  
Nemours Building – Suite 1200  
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Wilmington, DE 19801

Denise Seastone Kraft, Esquire  
Edwards Angell Palmer & Dodge LLP  
919 North Market Street – Suite 1500  
Wilmington, DE 19801

**RE: Magten Asset Management Corp. and Law Debenture Trust  
Company of New York, Plaintiffs, v. Northwestern  
Corporation, Defendant, D. Del., C.A. No. 04-1494-JJF**  
**-and-**  
**Magten Asset Management Corp., Plaintiff, v. Mike J. Hanson  
and Ernie J. Kindt, Defendant, D. Del., C.A. No. 05-499-JJF**

Dear Counsel:

I have received correspondence from counsel for Magten and Northwestern in response to my letter to the parties dated May 14, 2007 in which I outlined the agenda for the hearing on Friday. Based on the letters from Ms. Dube and Mr. Pizzurro, I have slightly revised the schedule of the issues to be presented on Friday. I have identified below the order in which argument will now be presented to me at the hearing:

1. With respect to Plaintiffs' Emergency Motion Seeking Orders, etc., and the Emergency Cross-Motion of Defendant Northwestern, etc.,



Dale R. Dube, Esquire  
Victoria Watson Counihan, Esquire  
Denise Seastone Kraft, Esquire  
Page 2  
May 17, 2007

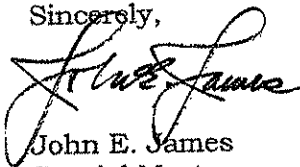
whether Northwestern has waived privilege with respect to the documents that Northwestern produced to Plaintiffs or whether the production was inadvertent or privilege was otherwise not waived;

2. With respect to the parties' motions referenced in paragraph 1 above, whether Plaintiffs are immediately required to return the documents or destroy the documents that are alleged to have been produced inadvertently or whether Plaintiffs can retain them until their privileged status is resolved;
3. With respect to the Plaintiffs' motion referenced in paragraph 1 above, whether Northwestern's identification of certain documents as privileged after the fact discovery cutoff, constitutes a waiver of privilege as to those documents;
4. With respect to the Plaintiffs' motion referenced in paragraph 1 above, whether the disclosure by Northwestern to the SEC of allegedly privileged documents waived the privilege as to those documents;
5. With respect to the Plaintiffs' motion referenced in paragraph 1 above, whether certain other documents that are subject to Plaintiffs' discovery requests are privileged or whether the privilege has been waived;
6. With respect to the Plaintiffs' motion referenced in paragraph 1 above, whether Northwestern should be required to produce certain documents in another electronic format;
7. The Joint Motion for Protective Order filed by Northwestern and Messrs. Hanson and Kindt as to certain depositions noticed by Plaintiffs;
8. Magten's Motion for Protective Order with respect to the deposition of Talton R. Embry; and
9. Plaintiffs' motion to exceed the ten deposition limit and to extend the discovery schedule for the taking of depositions in this action; and
10. Whether sanctions should be imposed with respect to any of the motions addressed in paragraphs 1 through 8 above.

Dale R. Dube, Esquire  
Victoria Watson Counihan, Esquire  
Denise Seastone Kraft, Esquire  
Page 3  
May 17, 2007

If I have failed to include any application that is pending before me, please notify me at your earliest convenience. Also, please forward this letter to all interested counsel.

Sincerely,



John E. James  
Special Master

JEJ/cml  
795277/30048-001 and 002

# EXHIBIT B



WILCOX & FETZER LTD.

In The Matter Of:

**Magten Asset Management Corp.  
and Law Debenture Trust Company  
of New York v. Northwestern  
Corporation and Hanon & Kindt**

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**Special Discovery Master Proceedings**

**C.A. # 04-1494-JJF & 05-499-JJF**

**May 18, 2007**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

MAGTEN ASSET MANAGEMENT CORP.                     )  
and LAW DEBENTURE TRUST COMPANY                 )  
OF NEW YORK,   )  
   )  
   ) Plaintiffs,                     )  
v.   ) Civil Action                     )  
   ) No. 04-1494-JJF                     )  
NORTHWESTERN CORPORATION,                     )  
   )  
   ) Defendant.                     )  
-----)   )  
MAGTEN ASSET MANAGEMENT CORP.,                 )  
   )  
   ) Plaintiff,                     )  
v.   ) Civil Action                     )  
   ) No. 05-499-JJF                     )  
MIKE J. HANSON and ERNIE J. KINDT,)                     )  
   )  
   ) Defendants.                     )

Potter, Anderson & Corroon LLP  
1313 North Market Street  
Wilmington, Delaware

Friday, May 18, 2007  
10:05 a.m.

BEFORE: JOHN E. JAMES, ESQ.  
SPECIAL DISCOVERY MASTER

TRANSCRIPT OF PROCEEDINGS

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<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES:  2 DALE R. DUBE, ESQ.  3 BLANK ROME LLP.  4 Chase Manhattan Centre  5 1201 Market Street - Suite 800  6 Wilmington, Delaware 19801  7 For the Plaintiff Magten Asset  8 Management Corp.  9 - and -  10 BONNIE STEINGART, ESQ.  11 GARY KAPLAN, ESQ.  12 JOHN BREWER, ESQ.  13 FRIED FRANK HARRIS SHRIVER &amp; JACOBSON LLP  14 One New York Plaza  15 New York, New York 10004-1980  16 For the Plaintiff Magten Asset  17 Management Corp.  18 KATHLEEN M. MILLER, ESQ.  19 SMITH KATZENSTEIN &amp; FURLOW  20 800 Delaware Avenue  21 Wilmington, Delaware 19899  22 - and -  23 JOHN V. SNELLINGS, ESQ.  24 NIXON PEABODY LLP  100 Summer Street  Boston, Massachusetts 02110-2131  For the Plaintiff Law Debenture Trust  Company of New York  VICTORIA W. COUNIHAN, ESQ.  GREENBERG TRAURIG LLP  The Nemours Building  1007 North Orange Street - Suite 1200  Wilmington, Delaware 19801  - and -  JOSEPH D. PIZZURRO, ESQ.  NANCY E. DELANEY, ESQ.  CURTIS MALLET-PREVOST COLT &amp; MOSLE LLP  101 Park Avenue  New York, New York 10178-0061  For Defendant NorthWestern Corporation</p>	<p style="text-align: right;">Page 4</p> <p>1 SPECIAL DISCOVERY MASTER JAMES: Good  2 morning. This is Special Master James. It's Friday,  3 May the 18th.  4 We're here today in connection with  5 discovery motions in two civil actions that have been  6 consolidated for discovery purposes that are pending  7 in the United States District Court for the District  8 of Delaware.  9 These two actions are Magten Asset  10 Management Corporation and Law Debenture Trust Company  11 of New York versus NorthWestern Corporation, Civil  12 Action No. 04-1494-JJF and Magten Asset Management  13 Corporation versus Michael J. Hanson and Ernie J.  14 Kindt, Civil Action No. 05-499-JJF.  15 Yesterday I sent a letter to counsel for  16 the parties identifying the order in which we were  17 going to address the issues today. I asked in that  18 letter whether there were any issues that I had  19 missed. I didn't hear any response from anyone.  20 Is this the current agenda that covers  21 everything?  22 MS. STEINGART: I think that there were  23 two items that were mentioned as possible additions,  24 Your Honor. I think that one thing we mentioned as a</p>
<p style="text-align: right;">Page 3</p> <p>1 APPEARANCES: (Cont'd)  2 DENISE KRAFT, ESQ.  3 EDWARDS ANGELL PALMER &amp; DODGE LLC  4 919 North Market Street - Suite 1500  5 Wilmington, Delaware 19801  6 - and -  7 STANLEY KALECZYC, ESQ. (Via teleconference)  8 KIMBERLY BEATTY, ESQ. (Via teleconference)  9 BROWNING KALECZYC BERRY &amp; HOVEN, P.C.  10 139 North Last Chance Gulch  11 Helena, Montana 59624  12 For the Defendants Mike J. Hanson  13 and Ernie J. Kindt  14  15  16  17  18  19  20  21  22  23  24</p>	<p style="text-align: right;">Page 5</p> <p>1 possible addition was that there were privileged  2 documents that were miscategorized as privileged,  3 either because they went to third parties or for some  4 other reason they were not. And so that was  5 additional to either inadvertence or to the privilege  6 log being late.  7 SPECIAL DISCOVERY MASTER JAMES: I believe  8 that's addressed in paragraph 5 of my letter of  9 yesterday.  10 MS. STEINGART: Oh, I'm sorry. I don't  11 have the letter of yesterday. I'm sorry. I was  12 looking at the wrong one.  13 I was on another matter. Excuse me, Your  14 Honor. I withdraw that.  15 SPECIAL DISCOVERY MASTER JAMES: All  16 right. Before we get started, was there anything else  17 that needs to be added to the agenda? Okay.  18 Why don't we have everyone go around and  19 introduce themselves and the parties that they  20 represent before we get started beginning with the  21 plaintiffs?  22 MS. STEINGART: Bonnie Steingart from  23 Fried, Frank on behalf of Magten.  24 MS. DUBE: Dale Dube from Blank, Rome on</p>

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1 behalf of Magten.  
2 MR. BREWER: John Brewer, Fried, Frank on  
3 behalf of Magten.  
4 MR. KAPLAN: Gary Kaplan from Fried,  
5 Frank, also on behalf of Magten.  
6 MR. SNELLINGS: John Snellings from Nixon  
7 Peabody on behalf of Law Debenture Trust Company of  
8 New York, the indenture trustee.  
9 MS. MILLER: Kathy Miller of Smith,  
10 Katzenstein & Furlow, also for Law Debenture.  
11 MS. KRAFT: Denise Kraft on behalf of  
12 Mr. Hanson and Mr. Kindt.  
13 MS. BEATTY: Kim Beatty with Browning,  
14 Kaleczyc, Berry & Hoven on behalf of Mr. Hanson and  
15 Mr. Kindt.  
16 MR. KALECZYC: Stan Kaleczyc, Browning,  
17 Kaleczyc, Berry & Hoven, for Hanson and Kindt.  
18 MS. COUNIHAN: Victoria Counihan,  
19 Greenberg Traurig, on behalf of NorthWestern.  
20 MS. DELANEY: Nancy Delaney, Curtis,  
21 Mallet, on behalf of NorthWestern.  
22 MR. PIZZURRO: Joseph Pizzurro, Curtis  
23 Mallet, on behalf of NorthWestern.  
24 SPECIAL DISCOVERY MASTER JAMES: Very

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1 basically these are cross-motions seeking similar  
2 relief with respect to this issue and, therefore, I  
3 would like to hear from Mr. Pizzurro first with  
4 respect to these two matters.  
5 MR. PIZZURRO: All right. As I understand  
6 it, the first issue is whether there is a waiver based  
7 on inadvertent production. So we have to deal with  
8 that issue before we can get to the issue of whether  
9 absent inadvertent production documents would be  
10 privileged or not based on some other basis.  
11 SPECIAL DISCOVERY MASTER JAMES: That's  
12 correct.  
13 MR. PIZZURRO: And so let me address that  
14 in the first instance. Our argument is based on  
15 paragraph 8. It's also based on an ancillary matter  
16 on Rule 26(b), but it is primarily based on paragraph  
17 8 of the stipulated protective order which was entered  
18 by Judge Farnan in this case. And I cannot think of  
19 plainer language that would govern this situation.  
20 This was language which in the first instance was  
21 actually offered by counsel for the plaintiffs at the  
22 last hearing that we had when they were seeking  
23 immediate production of the documents.  
24 Ms. Steingart said, as we have pointed out

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1 good.  
2 As indicated on the agenda, we're going to  
3 start first, and I'll read this into the record, with  
4 respect to plaintiffs' emergency motion seeking  
5 orders, et cetera and the motion and cross-motion of  
6 defendant NorthWestern, et cetera, whether or not  
7 NorthWestern has waived privilege with respect to the  
8 documents that NorthWestern produced to plaintiffs or  
9 whether the production was inadvertent or privilege  
10 was otherwise not waived.  
11 I think it makes sense to address this  
12 issue at the same time as we address the item  
13 mentioned in number 2, which is with respect to the  
14 parties' motions referenced in paragraph 1 above,  
15 whether plaintiffs are immediately required to return  
16 the documents or destroy the documents that are  
17 alleged to have been produced inadvertently or whether  
18 plaintiffs can retain them until their privilege  
19 status is resolved.  
20 Now, I would like to start with, I would  
21 like to hear from counsel for NorthWestern first  
22 because I think, A, the burden is on NorthWestern with  
23 respect to showing that anything is privileged and  
24 while the plaintiffs filed their motion first,

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1 in the transcript I think it's page 19 of the original  
2 transcript, that in addressing the burdens of the  
3 production of the hundreds of thousands of documents  
4 on an almost immediate basis Ms. Steingart was saying  
5 look, if they want, if they have got a problem and  
6 they want a protection against inadvertent protection,  
7 we will give them protection against inadvertent  
8 production and then went on to say the burden is on  
9 us, the plaintiffs, to deal with this massive material  
10 within the period that Your Honor would order.  
11 This was negotiated after that and this  
12 language makes clear two things. First of all, that  
13 inadvertent production cannot constitute a waiver of a  
14 privilege. It says it in haec verba and it further  
15 more says that when a party receiving those documents  
16 is notified of the inadvertent production they have  
17 one option and one option only and that is, two  
18 options, to destroy the documents or to return them.  
19 They then have the ability to make a  
20 motion to compel and they can as a basis for that  
21 motion as to whether or not the documents are  
22 privileged one assumes they can raise virtually any  
23 basis for challenging the privilege, except they may  
24 not assert the fact or circumstances of the



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1 inadvertent production.

2       So this is what Judge Farnan ordered after  
3 the parties had negotiated it very carefully in the  
4 circumstances of this case. So for an argument to be  
5 made that there is a waiver here based on the  
6 inadvertent production or the circumstances and for  
7 the plaintiffs to be relying on a body of law which  
8 has, first of all, nothing to do with this order and  
9 which even antedates the amendments to Rule 26 which  
10 talks about circumstances in which the inadvertent  
11 production of documents may or may not be a waiver,  
12 that's a body of law which was developed in a regime  
13 where inadvertent production might constitute a  
14 waiver.

15       In this case inadvertent production cannot  
16 constitute a waiver. Otherwise, what Judge Farnan  
17 ordered is meaningless. There's no meaning that I can  
18 find in this document, in this paragraph if one could  
19 find a waiver based on inadvertent production.

20       The other argument that has been made is  
21 whether the notice was adequate because it does  
22 provide that the party shall constitute -- the party  
23 shall promptly notify all receiving parties in writing  
24 of the inadvertent production.

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1       The notice of inadvertent production in  
2 this case when it was first discovered was within  
3 hours of the discovery. And as our correspondence and  
4 my affidavit makes clear, we immediately began an  
5 investigation and as we discovered more inadvertently  
6 produced privileged documents, there was an immediate  
7 notice that was sent with respect to each.

8       The case law in the State of Delaware and  
9 elsewhere which is dealing with the issue of whether  
10 or not notice is prompt under these circumstances is  
11 virtually unanimous in measuring the time from not  
12 when the document was produced but when the discovery  
13 of the inadvertent production was made, which only  
14 makes sense because otherwise it becomes virtually  
15 meaningless.

16       So if one might argue that had  
17 NorthWestern sat for weeks on its rights having known  
18 that this had occurred that the notice would not be  
19 prompt and perhaps the provisions wouldn't be  
20 triggered, but that argument is simply unavailing  
21 here. So we notified them immediately. We provided  
22 them with a subsequent privilege log which identified  
23 all of the bases for the privilege, as well as they  
24 didn't need the description of the document having had

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1 the document. We asked them to immediately certify  
2 its destruction or to return it. We have received no  
3 documents even to date. They were provided with  
4 substitute disks which has the original production  
5 with the inadvertently produced privileged documents  
6 excised.

7       So I just don't understand given what the  
8 parties here clearly intended and what the judge  
9 ordered how there can be any basis for arguing that a  
10 waiver occurred here based on the inadvertent  
11 production.

12       SPECIAL DISCOVERY MASTER JAMES: Now, one  
13 question I have, and this was raised by your  
14 opponents, is that in your opening memorandum in  
15 support of your motion you address Rule 26(b)(5)(B).  
16 Based on your argument today and the argument you made  
17 in your motion, what relevance, if any, does that rule  
18 have to this process if, in fact, after that rule was  
19 enacted the parties with Judge Farnan's approval  
20 entered into paragraph 8 in the confidentiality order  
21 that was entered I believe on March the 21st or  
22 thereabouts?

23       MR. PIZZURRO: Well, I think the relevance  
24 of the rule, and the rule changed, is really simply to

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1 provide context to show why these types of agreements  
2 have become important and necessary and it's a  
3 recognition by Congress and the Federal Rules that  
4 with sort of the massive complete change now in  
5 discovery with massive electronic discovery that the  
6 concept of inadvertent production as a waiver is  
7 something which has changed and it's changed in the  
8 Federal Rules.

9       But as we pointed out, the commentary to  
10 the rules makes clear as well that it's contemplated  
11 that the parties will often have their own agreements  
12 which may or may not be ordered by the Court. Here  
13 it's ordered by the Court. And in the instance where  
14 there's an inconsistency between the procedures that  
15 are provided in the parties' own agreement or the  
16 Court's order and the provisions of Rule 26(b) that  
17 this agreement would govern.

18       Why is that important here? It's  
19 important here because the plaintiffs have claimed  
20 that they have a right under the procedures that are  
21 provided for in the federal rule to retain the  
22 documents, sequester them, provide them to the Court  
23 and have the Court make a determination in camera.  
24 And that is at odds with the provisions that the

<p style="text-align: right;">Page 14</p> <p>1 parties agreed to and the Court ordered in this case,  2 which is they have no such option.  3 The only thing I think one would imply  4 that is not in this agreement that is in the rule is  5 that once those documents were returned or if they  6 were certified destroyed that the producing party  7 would clearly be under an obligation to retain those  8 documents so that they would be available if the Court  9 wanted to view them in a subsequent motion. That's  10 specifically provided for in the federal rule. It's  11 not addressed in this paragraph. I think that's  12 something which is the only residual effect that the  13 rule would have here.  14 But here the provisions of the paragraph  15 which the judge ordered I think clearly govern.  16 SPECIAL DISCOVERY MASTER JAMES: Does Rule  17 26(b)(5)(B) do anything more than codify, if you will,  18 the rather extensive case law on inadvertent  19 production that had existed prior to that date?  20 MR. PIZZURRO: Well, you know, I could  21 speculate. I don't think there's very much case law,  22 if any, that answers that question.  23 SPECIAL DISCOVERY MASTER JAMES: Do the  24 committee -- I can't remember. Do the committee's</p>	<p style="text-align: right;">Page 16</p> <p>1 substantial back and forth on the entire agreement.  2 It took, it took more than a month for the agreement  3 to be finalized.  4 SPECIAL DISCOVERY MASTER JAMES: Yes.  5 What was the date of my order, my previous order in  6 this case?  7 MR. PIZZURRO: The 29th of January, I  8 believe.  9 SPECIAL DISCOVERY MASTER JAMES: So it  10 took you the better part of seven weeks to come up  11 with this after that, correct?  12 MR. PIZZURRO: Correct.  13 SPECIAL DISCOVERY MASTER JAMES: Was  14 paragraph 8 a sticking point in that process?  15 MR. PIZZURRO: I don't recall that it was.  16 MS. DELANEY: I don't recall that it was.  17 MR. PIZZURRO: No.  18 SPECIAL DISCOVERY MASTER JAMES: Now, I'm  19 probably older than anyone here, but I'm sure I've  20 seen -- these are commonly referred to as pullback  21 provisions or clawback provisions and I'm sure I have  22 seen more than Judge Farnan and probably any other  23 judge on the Court.  24 And I would gather, Mr. Pizzurro, that you</p>
<p style="text-align: right;">Page 15</p> <p>1 comments or the comments to the rules state anything  2 about that?  3 MR. PIZZURRO: The advisory committee does  4 talk about the existing body of law that has developed  5 regarding inadvertent production and whether there's a  6 waiver. And I believe, not having it in front of me,  7 that it says that the rule does not necessarily  8 address that, but that issue I think is irrelevant.  9 That's why the parties, particularly in this case,  10 insisted on and had the judge order the provisions of  11 paragraph 8.  12 SPECIAL DISCOVERY MASTER JAMES: Did  13 either side in crafting paragraph 8 to the  14 confidentiality order, did either side take the lead  15 in that, preparing that language?  16 MS. DELANEY: I think we did the initial  17 draft and exchanged it with plaintiffs' counsel,  18 received extensive comments and there were maybe a  19 dozen exchanges of the agreement before it was  20 finalized.  21 SPECIAL DISCOVERY MASTER JAMES: That's  22 the whole agreement or paragraph 8?  23 MS. DELANEY: No. I don't recall -- the  24 whole agreement. The whole agreement. There was</p>	<p style="text-align: right;">Page 17</p> <p>1 have seen these quite frequently?  2 MR. PIZZURRO: I've seen them in other  3 agreements, yes, sir.  4 SPECIAL DISCOVERY MASTER JAMES: And what  5 is your general understanding of the purpose they are  6 to serve?  7 MR. PIZZURRO: My understanding of the  8 purpose they are to serve is to deal with situations  9 precisely that we have here, where you have massive  10 discovery, where it is virtually a certainty given the  11 circumstances that something is going to slip through  12 that ought to be designated as privileged. And the  13 intent is not to put a burden on the producing party  14 to have to defend itself against a claim of waiver  15 based on inadvertent production.  16 Any other basis that would exist in a  17 challenge to the production of the document as  18 privileged or not is obviously open, but the intent  19 here is to prevent arguments. I mean if -- what could  20 be clearer as a basis for a motion to compel you may  21 not assert the fact or circumstances of the  22 inadvertent production; inadvertent production shall  23 not constitute a waiver of immunity or privilege? The  24 language could not be clearer. There's no ambiguity</p>

<p style="text-align: right;">Page 18</p> <p>1 in this.</p> <p>2 SPECIAL DISCOVERY MASTER JAMES: Let's</p> <p>3 take a minute and look at your affidavit in support of</p> <p>4 your motion.</p> <p>5 Off the record.</p> <p>6 (Discussion off the record.)</p> <p>7 SPECIAL DISCOVERY MASTER JAMES: Now,</p> <p>8 initially there were some inadvertent productions I</p> <p>9 guess of a more limited scale. I can't recall the</p> <p>10 dates precisely, but I think it was maybe December or</p> <p>11 January.</p> <p>12 MR. PIZZURRO: I think they're discussed</p> <p>13 at paragraphs 5 and 6 of my affidavit and it's January</p> <p>14 and February.</p> <p>15 SPECIAL DISCOVERY MASTER JAMES: Were</p> <p>16 those inadvertent disclosures in terms of the number</p> <p>17 of documents more limited than the later ones?</p> <p>18 MR. PIZZURRO: They were more limited and</p> <p>19 they were of a different nature. The problems that</p> <p>20 came up in these instances were technical problems.</p> <p>21 They were problems that had to do in one case with</p> <p>22 what was on the load file as opposed to what was on</p> <p>23 the disk.</p> <p>24 Now, I'm --</p>	<p style="text-align: right;">Page 20</p> <p>1 MR. PIZZURRO: The exhibit is Exhibit 1,</p> <p>2 the letter of Ms. Bagnato of January 16, 2007. It's</p> <p>3 Exhibit 1 to the affidavit. And the letter does say</p> <p>4 that "The production of CD's delivered to you on</p> <p>5 December 18 and 21, 2006 inadvertently contained</p> <p>6 attorney-client privileged information. The</p> <p>7 privileged material is redacted on the images</p> <p>8 themselves and in the hard copies printed from the</p> <p>9 images contain such redactions. However, the</p> <p>10 privileged material was not redacted in a data field</p> <p>11 on the concordance load file." And then there's a</p> <p>12 list of the ranges of Bates numbers and then it says,</p> <p>13 "Enclosed are two replacement CD's in which the</p> <p>14 privileged material has been correctly redacted in the</p> <p>15 all text data fields. Please destroy the previous</p> <p>16 CD's or return them to my attention."</p> <p>17 SPECIAL DISCOVERY MASTER JAMES: And how</p> <p>18 did Magten respond to that?</p> <p>19 MR. PIZZURRO: My recollection is that</p> <p>20 they returned the CD's and we gave them, you know,</p> <p>21 they took the new ones.</p> <p>22 MS. STEINGART: Right. Can you just tell</p> <p>23 me? I think we just threw them away and we confirmed</p> <p>24 that.</p>
<p style="text-align: right;">Page 19</p> <p>1 SPECIAL DISCOVERY MASTER JAMES: When you</p> <p>2 say, "these instances," you're talking about the early</p> <p>3 instances?</p> <p>4 MR. PIZZURRO: The early instances. So</p> <p>5 those were errors that occurred in terms of the</p> <p>6 technology and it was discovered virtually immediately</p> <p>7 because the technical people were able to say there's</p> <p>8 a problem here and then a review and then boom, we</p> <p>9 immediately notified them. And those instances did</p> <p>10 not present any problems between the parties.</p> <p>11 SPECIAL DISCOVERY MASTER JAMES: And do I</p> <p>12 understand -- well, I can't remember if I saw a</p> <p>13 letter. They're probably in here.</p> <p>14 When you notified Magten of that</p> <p>15 inadvertent production, was the language in the letter</p> <p>16 advising them of that similar to the language employed</p> <p>17 in the later letters, which is basically we've</p> <p>18 inadvertently produced X range of documents; please</p> <p>19 return them?</p> <p>20 MR. PIZZURRO: We'll have to look at the</p> <p>21 letter.</p> <p>22 It says-</p> <p>23 SPECIAL DISCOVERY MASTER JAMES: Direct me</p> <p>24 to the exhibit.</p>	<p style="text-align: right;">Page 21</p> <p>1 MR. PIZZURRO: Right.</p> <p>2 SPECIAL DISCOVERY MASTER JAMES: Now, this</p> <p>3 is before you even had paragraph 8 in the</p> <p>4 confidentiality order, correct?</p> <p>5 MR. PIZZURRO: That's correct.</p> <p>6 SPECIAL DISCOVERY MASTER JAMES: Okay.</p> <p>7 Now, as we move along in April looking at paragraphs 8</p> <p>8 et seq. of your affidavit, there was the discovery on</p> <p>9 the evening of April the 3rd that a privileged</p> <p>10 document was inadvertently produced. Is that correct?</p> <p>11 MR. PIZZURRO: Correct.</p> <p>12 SPECIAL DISCOVERY MASTER JAMES: Now, was</p> <p>13 that a function of a computer error or was that a</p> <p>14 function of human error?</p> <p>15 MR. PIZZURRO: That was human error. The</p> <p>16 remainder of, everything from this date forward my</p> <p>17 understanding is was based on human error.</p> <p>18 SPECIAL DISCOVERY MASTER JAMES: So the</p> <p>19 argument that Magten has made that while you recognize</p> <p>20 that you had produced documents inadvertently in</p> <p>21 December or January that that somehow should have</p> <p>22 alerted you to go back and look at all of your</p> <p>23 production or take whatever steps were reasonable</p> <p>24 under the circumstances to see if you had</p>

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1 inadvertently produced documents, is that a legitimate  
2 argument to make under these circumstances?

3 MR. PIZZURRO: Well, I don't see how it  
4 could be. First of all, there were no further  
5 inadvertent productions as a result of technological  
6 glitches, so that problem was rectified.

7 The problem that occurred thereafter was  
8 one strictly of human error. So the procedures that  
9 gave rise to the discovery in January and February  
10 were completely different. It's just of a different  
11 nature than what occurred subsequently.

12 Once we realized that there had been  
13 error, and the first time we realized that there had  
14 been human error was on April 3rd, we commenced  
15 immediately a thorough re-review. And that's why it  
16 took some time to finally resolve this because it was  
17 an extraordinary mass of material that had to be  
18 re-reviewed and as it was being re-reviewed and every  
19 time we came across anything of inadvertent production  
20 of privileged documents, we notified the plaintiffs.  
21 And they received letters on the 3rd, they received a  
22 letter on the 5th, they received -- there were two  
23 letters on the 12th. The reason there were two  
24 letters on the 12th is because there was the discovery

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1 of some information early in the day and Mr. Orme was  
2 being deposed that afternoon in Atlanta and so the  
3 people in the office felt that the prudent thing to do  
4 would be to get a letter out before that deposition  
5 were to start in the event that counsel had some of  
6 this material and hadn't been notified of the  
7 inadvertent production and then there was a subsequent  
8 letter that evening and the final letter was I believe  
9 the 16th.

10 SPECIAL DISCOVERY MASTER JAMES: How many  
11 documents -- I know it's in the papers. But ballpark  
12 number, how many pages of documents are you alleging  
13 were inadvertently produced that were the subject of  
14 the April discoveries?

15 MR. PIZZURRO: I don't know the number of  
16 pages. I'm going to say a thousand. Is that right?

17 MS. STEINGART: Way more.

18 SPECIAL DISCOVERY MASTER JAMES: Is this  
19 the six notebooks --

20 MR. PIZZURRO: Six binders like that  
21 (indicating).

22 SPECIAL DISCOVERY MASTER JAMES: Six  
23 binders.

24 MR. PIZZURRO: I take Ms. Steingart's

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1 word.

2 MS. STEINGART: Just as a fillup to that,  
3 some of these documents, one document itself is a  
4 three-binder document and four copies of that document  
5 were produced, four different sets of Bates numbers,  
6 so that copy was Bates stamped and produced in four  
7 separate places in the production.

8 And so when we talk about the number  
9 re-called, we're talking of tens of thousands of  
10 documents that were recalled.

11 MR. PIZZURRO: Let me make a point on that  
12 because I think that's the Hylland report and that  
13 report was also, is also on the original privilege  
14 log, so there's no question that the document was  
15 recognized by us as privileged. Multiple copies of it  
16 did get through, but it was on the original privilege  
17 log.

18 So there isn't any issue as to whether or  
19 not from NorthWestern's point of view it viewed the  
20 document as privileged. It clearly did.

21 SPECIAL DISCOVERY MASTER JAMES: When did  
22 that first privilege log come out?

23 MR. PIZZURRO: Well, the privilege log was  
24 provided on the 23rd of March.

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1 SPECIAL DISCOVERY MASTER JAMES: So before  
2 this April 3rd event.

3 MR. PIZZURRO: Yes.

4 SPECIAL DISCOVERY MASTER JAMES: What  
5 exactly is this report?

6 MR. PIZZURRO: This is the special report  
7 or a report by the special committee of the board of  
8 directors investigating Mr. Hylland, who was the CEO  
9 of the company during 2002.

10 SPECIAL DISCOVERY MASTER JAMES: Okay.  
11 Now, you found one document on April 3rd that you  
12 clearly knew was privileged. I'm a little intrigued  
13 by the fact that that would lead you then to take a  
14 wholesale review of all your documents, if I  
15 understand you correctly.

16 Was there something special about this  
17 document that was in a category that --

18 MR. PIZZURRO: Yes.

19 SPECIAL DISCOVERY MASTER JAMES: -- sort  
20 of said to you as an experienced litigator well, the  
21 associates who looked at this may have missed the ball  
22 or what exactly led to that?

23 MR. PIZZURRO: This document was the  
24 Hylland report. This was a document which in my



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1 judgment never under any circumstances should have  
2 permitted it to be produced and when I found out -- if  
3 this had been an e-mail from the general counsel to  
4 the CFO about, you know, X, Y, Z, three, four lines,  
5 something like that, I think we still probably would  
6 have wanted to review our procedures and see whether  
7 we should conduct more extensive review, but given the  
8 nature of this document it was clear that we needed to  
9 do a thorough review of the production.  
10 SPECIAL DISCOVERY MASTER JAMES: Off the  
11 record.  
12 (Discussion off the record.)  
13 SPECIAL DISCOVERY MASTER JAMES: Okay.  
14 Thank you.  
15 Let's hear from Magten on this.  
16 MS. STEINGART: Thank you, Your Honor.  
17 I think that I'll begin with paragraph 8  
18 because Mr. Pizzurro has begun with paragraph 8 of the  
19 order. Certainly paragraph 8 of the order, from our  
20 point of view paragraph 8 of the order and 26(b)(5)(B)  
21 operate together. And I do not disagree with  
22 Mr. Pizzurro that where you have an order and you have  
23 made an agreement that is different or exceeds or is  
24 less than the rule that that governs.

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1 However, it makes clear that the  
2 production must first be inadvertent. Inadvertence  
3 was not waived in that paragraph.  
4 SPECIAL DISCOVERY MASTER JAMES: Every  
5 single pullback order I have ever seen uses that word  
6 in it.  
7 MS. STEINGART: Right.  
8 SPECIAL DISCOVERY MASTER JAMES: You have  
9 seen many of these. Have you seen any that did not  
10 use the word inadvertent production?  
11 MS. STEINGART: Yes. And because -- and  
12 that paragraph is included very often because there  
13 are circumstances and there are jurisdictions where  
14 inadvertent production itself is a waiver. And the  
15 paragraph was put in and the paragraph was designed.  
16 It was a boilerplate agreement that was given to us  
17 and I have no dispute with that paragraph, but it does  
18 not mean, it does not mean that there is a waiver of  
19 the threshold question that arises when anyone  
20 requests a pullback under that paragraph. The  
21 threshold question is inadvertence.  
22 And most times, Your Honor, that is -- I  
23 would accept, most times I accept the ipse dixit of  
24 the producing party on inadvertence. But let's be

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1 clear here. There were three occasions prior to this  
2 occasion, not one, but there were three occasions  
3 where CD's had been produced and where we received a  
4 letter or replacement CD that indicated that  
5 privileged material had inadvertently been produced.  
6 And that occurred on December 18th, on  
7 December 21st, on January 19th and on January 25th.  
8 On each of those occasions we did what we were  
9 requested to do. That's number one.

10 On each of these --  
11 SPECIAL DISCOVERY MASTER JAMES: Let me  
12 ask you: Did it occur to you to challenge the  
13 statement at that point that those documents had not  
14 been inadvertently produced?  
15 MS. STEINGART: It did not occur to us.  
16 SPECIAL DISCOVERY MASTER JAMES: Why not?  
17 MS. STEINGART: Because those requests  
18 came very soon after the production was given to us  
19 and at the time we took a different position as to  
20 this production. The question about the document we  
21 believed and it was not until we got the papers from  
22 Mr. Pizzurro that he made a different assertion. We  
23 believe that the claim is being made because we  
24 brought the document to their attention. We had

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1 written to them early on the day of April 5th and said  
2 you produced many copies of Mr. Hylland's report in  
3 your production, each bearing different Bates numbers,  
4 Your Honor. It's not that one copy slipped through.  
5 There were a number of copies with different Bates  
6 numbers. And we said you have produced any number of  
7 copies of Mr. Hylland's report and there's certain  
8 exhibits. The report is voluminous. There's the body  
9 of the report and then there's some exhibits.

10 Many of the exhibits, sir, are not  
11 privileged documents. They're e-mails or other things  
12 that are in the normal course of business for the  
13 company.

14 SPECIAL DISCOVERY MASTER JAMES: Let me  
15 stop you there.

16 Did you know or did you check, I assume  
17 you did, with your staff to see if that document had  
18 been listed on their log?

19 MS. STEINGART: Well, it's hard -- we  
20 can't tell which documents are listed on the log  
21 because the Bates stamps are different, number one.

22 Number two, many of the documents, and I  
23 have examples with me, sir, that were produced are  
24 marked attorney-client privileged. There are so many

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1 times these documents were produced by NorthWestern --  
 2 this is not a hastily assembled, produced production  
 3 of documents. This production of documents has been  
 4 assembled and produced any number of times by  
 5 NorthWestern to various entities or government  
 6 agencies.

7 So our view is that there were a lot of  
 8 documents that were produced that said attorney-client  
 9 privilege that hadn't been requested back; that there  
 10 was a large number of this particular document, a  
 11 large number of copies of it produced. We had no way  
 12 of matching the Bates numbers of things that they said  
 13 were produced with the log or of knowing whether a  
 14 particular version of it that they had on the  
 15 privilege log was a version that they wanted to pull  
 16 back because there was some annotation on it.

17 SPECIAL DISCOVERY MASTER JAMES: How was  
 18 this report described on the privilege log?

19 MS. STEINGART: I don't recall, Your  
 20 Honor.

21 SPECIAL DISCOVERY MASTER JAMES:  
 22 Mr. Pizzurro, do you know?

23 MR. PIZZURRO: I believe, I believe it's  
 24 described as the special report or the report of the

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1 Then as we're preparing for depositions,  
 2 we write asking for these exhibits and we get a  
 3 response no, this is a privileged document. It's not  
 4 as if we received the same unsolicited request from  
 5 the company that said we have inadvertently produced.

6 Now, we talk about notice and were they --  
 7 SPECIAL DISCOVERY MASTER JAMES: Let's  
 8 stop for a minute. Do we have the name of the  
 9 document?

10 MR. PIZZURRO: Yes. It's listed at entry  
 11 1669. It's described as the special committee of the  
 12 board of directors and PHJW, that's Paul, Hastings, as  
 13 special counsel. And the subject matter is  
 14 investigation of Richard Hylland's performance and  
 15 conduct in connection with mismanagement of  
 16 NorthWestern and its subsidiaries.

17 SPECIAL DISCOVERY MASTER JAMES: Is the  
 18 date given in the date field for privilege?

19 MS. DELANEY: 4-25-2003.

20 SPECIAL DISCOVERY MASTER JAMES: All  
 21 right. Now, on the one that was allegedly  
 22 inadvertently produced, what's the date that that  
 23 document bears?

24 MR. PIZZURRO: It's the same document.

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1 special committee.

2 MR. BREWER: If he gives me the number,  
 3 I've got the log.

4 MR. PIZZURRO: I've got it.

5 MS. STEINGART: So, Your Honor, at the  
 6 time we believed the assertion it was privileged was  
 7 in response to a letter we sent that said you've  
 8 produced numerous copies of this report; where are the  
 9 exhibits?

10 Several hours later we received a letter  
 11 from Ms. Delaney that said that's privileged; give it  
 12 back. And we looked at each other and we said there  
 13 have been various requests back for privileged  
 14 material. In the last production of documents which  
 15 was on March 23rd -- the cutoff was March 16th. The  
 16 privilege log was due March 23rd. On March 23rd we  
 17 get the privilege log and we get additional documents  
 18 and what NorthWestern said is you're getting these  
 19 documents late with the privilege log because we had  
 20 initially designated them as privileged but changed  
 21 our mind; they're not privileged. No complaint from  
 22 us. Certainly close in time. They in good faith had  
 23 made a large pile of privileged things and someone had  
 24 gone through it and said not privileged.

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1 MS. DELANEY: There's only one that I know  
 2 of.

3 MR. PIZZURRO: There's only one that I am  
 4 aware of.

5 SPECIAL DISCOVERY MASTER JAMES: So,  
 6 Ms. Steingart, you said it might have been a different  
 7 version.

8 MS. STEINGART: It could have been a  
 9 different version. I don't know that all of them have  
 10 the same date because I stopped looking at it once I  
 11 got the letter. So I don't know if the four copies  
 12 that I have are the same date or if one copy has an  
 13 annotation and that's why that copy is listed as  
 14 privilege. Certainly --

15 SPECIAL DISCOVERY MASTER JAMES: Well,  
 16 somebody on your staff certainly would have done that,  
 17 correct? Did Mr. Brewer do it?

18 MS. STEINGART: Well, did we compare every  
 19 version that we had of that document?

20 MR. BREWER: Well, one of the problems  
 21 was, Your Honor, that in the initial letter we got or  
 22 maybe the second letter we got said there are -- you  
 23 know, we're asking for these forty things back which  
 24 are on our log and there are an additional thirty

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1 things which were not on our original log but we're  
2 putting on a supplemental log. But that letter -- and  
3 I understand it was prepared in haste -- did not match  
4 up. It did not say this one is our log entry  
5 such-and-such.

6 So we did not at that time take those  
7 forty documents and try to match them up with which of  
8 the 1600 log entries they might correspond to, which  
9 would have of course required us to be looking at each  
10 of those documents carefully which they told us they  
11 didn't want us to be doing. We got at some point I  
12 think in this supplemental log which we got I want to  
13 say on April 22nd, or I could be wrong about that,  
14 they added some Bates numbers which made it possible  
15 for the first time to match up their requests with the  
16 log by correlating the Bates numbers.

17 The other thing I would say from having  
18 looked at the Hylland report before they asked for it  
19 back is on its face I'm not doubting that lawyers were  
20 involved in the drafting of the document. Everyone  
21 knows that's how special committee documents get done.  
22 On its face it doesn't say this is the report of the  
23 special committee and Paul, Hastings or the report  
24 of -- it said this is the report of these two

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1 non-lawyer directors to the rest of the board.

2 So if I was comparing the log to the  
3 document, I think we could have -- you know, obviously  
4 if there was a draft, if Paul, Hastings had prepared  
5 the final draft saying to the special committee this  
6 is what we think you should deliver to the rest of the  
7 board, that would be privileged. The document we have  
8 which cites on its face this is the report of these  
9 two members of the board or the special committee to  
10 the rest of the board.

11 SPECIAL DISCOVERY MASTER JAMES: That's  
12 very helpful and that's very helpful background.

13 I want to focus primarily on the  
14 inadvertence issue here and I want to focus primarily  
15 on provision or paragraph 8 to the confidentiality  
16 order.

17 What was your understanding when this was  
18 signed and approved by the Court? What would this do  
19 that 26(b)(5)(B) would not do?

20 MS. STEINGART: What this would do, the  
21 only thing that this would do that Rule 25(b)(5)(B)  
22 would not do --

23 SPECIAL DISCOVERY MASTER JAMES: Rule 26

24 MS. STEINGART: Rule 26. I'm sorry.

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1 26(b)(5)(B) would not do would be to require us to  
2 destroy it before making a motion to compel.

3 But my view is that we did not waive any  
4 dispute we had as to whether it was inadvertent, nor  
5 did we have to accept if circumstances gave us  
6 reasonable cause to believe it was not inadvertent a  
7 characterization of inadvertence. And, indeed, we  
8 wrote a very detailed letter to counsel explaining  
9 why, one, we did not believe it was inadvertent; two,  
10 why we did not believe it was prompt and, three, why  
11 we did not believe that much of the material requested  
12 was privileged.

13 SPECIAL DISCOVERY MASTER JAMES: Yes. I'm  
14 familiar with all of that. Let me ask you, let me ask  
15 you you have obviously had experience with pullback  
16 and clawback provisions.

17 MS. STEINGART: Yes, I have.

18 SPECIAL DISCOVERY MASTER JAMES: Based on  
19 what I am hearing today, it's your position, unless  
20 this is sui generis, that a pullback or a clawback  
21 provision really doesn't add anything to the process  
22 of dealing with inadvertent production; that they may  
23 have been used in jurisdictions where the law treated  
24 any production of privileged documents as an automatic

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1 waiver so, therefore, it may have added some  
2 protection. But I'm just confused because in Delaware  
3 where this case is being litigated and in the federal  
4 court these provisions are used to avoid the very  
5 dispute we're having today.

6 And I'm wondering whether you consulted  
7 with your local counsel or with anyone else or looked  
8 at Delaware law before you entered into this.

9 MS. STEINGART: We did, sir. But we did  
10 not think that we waived inadvertence. We thought  
11 that the circumstances here because of the three other  
12 requests for return of disks, because this request was  
13 in response to what we had asked, because there were  
14 numerous copies of this voluminous document, for all  
15 the good reasons that we thought about, because this  
16 is -- and I'm sure you can understand from the back  
17 and forth on this that especially prior to the cease  
18 and desist order this was a very key document for  
19 everybody and it's not something that we thought in  
20 any way, shape or form was the product of  
21 inadvertence. And for the reasons that I described,  
22 there were a number of other documents that were  
23 labeled such as this that have been produced and not  
24 clawed back.



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1 So sometimes when you have a production --  
 2 and I have done this as counsel and I'm sure that  
 3 Mr. Pizzurro has too. You get a voluminous production  
 4 and all of a sudden you see something that says  
 5 attorney-client privilege. The only thing you say is  
 6 you call the other side and say did you mean to do  
 7 this? We both have done that.

8 Here the production is riddled with such  
 9 documents because there was labeling done to produce  
 10 to the SEC. There was labeling done in other contexts  
 11 for the Justice Department, so there are numerous  
 12 documents throughout the production and, as I say, I  
 13 have some here with me that are labeled attorney-  
 14 client work product. That would not have been a  
 15 notice for us and that would be not something that  
 16 would have clued us into the status of the document.

17 We believed when we wrote this letter that  
 18 because subsequent to the production of these  
 19 documents and in connection with other disks that  
 20 there was the clawback for privilege that this was  
 21 just someone reevaluating a decision that was made.  
 22 And subsequent events have justified that view because  
 23 of the distribution that this document received, not  
 24 only to the SEC but to the director who was the

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1 waiver, this sentence has less meaning than in other  
 2 jurisdictions.

3 But if it means that one cannot question  
 4 inadvertence, then why have inadvertence in the  
 5 paragraph at all? Why not just have production of  
 6 documents subject to work product privilege? Why do  
 7 you even need inadvertence? You know, that's the  
 8 problem here. If you just say anything that people  
 9 say by ipse dixit is inadvertent, then you take it out  
 10 in two places. You take it out as the first word in  
 11 the sentence and you take it out in that paragraph.

12 SPECIAL DISCOVERY MASTER JAMES: Have you  
 13 seen versions of pullback orders in which there are  
 14 specific time periods either in which the party  
 15 claiming inadvertence has to or time periods from the  
 16 date of production or time periods from the date of  
 17 noticing the inadvertence to claim inadvertence?

18 MS. STEINGART: I have, I have -- I am  
 19 familiar with the fact that some people have  
 20 agreements like that. I have never been a party to  
 21 such an agreement that has a time frame.

22 And that's because I think, you know --  
 23 and it's not here because I think that the importance  
 24 of the time and the fact of the time and what it

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1 subject of the, the officer and the director who was  
 2 the subject of the investigation who had already  
 3 resigned from the company and who was in an  
 4 adversarial position to NorthWestern who was provided  
 5 a copy of this report.

6 Indeed, I don't think Mr. Pizzurro as he  
 7 sits here today would be able to give us an exhaustive  
 8 and complete list of everyone who has received a copy  
 9 of this report.

10 SPECIAL DISCOVERY MASTER JAMES: Well,  
 11 that may go to whether it's privileged or not or  
 12 whether the privilege is waived, but it doesn't  
 13 necessarily deal with the issue I'm focusing on.

14 Let's look at paragraph 8. Do you have  
 15 that in front of you of the confidentiality order?

16 MS. STEINGART: Yes, Your Honor, I do.

17 SPECIAL DISCOVERY MASTER JAMES: What's  
 18 the meaning of the last sentence in your  
 19 interpretation?

20 MS. STEINGART: The meaning of the last  
 21 sentence is that the fact or circumstances of the  
 22 inadvertence could not be used as a claim for waiver.  
 23 And in a jurisdiction, in a jurisdiction where  
 24 inadvertence by itself does not provide grounds for

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1 measures from differs from point to point. And when  
 2 people say well, I only discovered it at a certain  
 3 point, that in itself is a conclusion. There were  
 4 various points in time when there were questions  
 5 raised about the productions that were done and if you  
 6 get, if you have done a review for privilege and you  
 7 let something go through or you let a body of material  
 8 like this go through and then you say well, I looked  
 9 at it again and I decided these other things are  
 10 privileged or I looked at it differently or I'm

11 looking at it a third time, they could look at it next  
 12 week on this basis and the light bulb could go off  
 13 again that something is privileged and I would just  
 14 have to say okay if that's what this paragraph meant.

15 But I think that what this paragraph means  
 16 is that if I have a good faith belief based on facts  
 17 and circumstances that I can set before you that it's  
 18 not inadvertent, that it's not prompt, that it's not  
 19 privileged, that I get to see that and this doesn't  
 20 cut off my ability to do that. And I think here we  
 21 had every reasonable ground to think that those three  
 22 indicia were not present with respect to all or most  
 23 of the documents.

24 I mean, one of the things that

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1 Mr. Pizzurro said in passing was that gee, we had a  
2 short time to produce hundreds of thousands of  
3 documents. That's not so. That's just not so. They  
4 had plenty of time. They knew for a year before they  
5 began this production they would have to make this  
6 production.

7 SPECIAL DISCOVERY MASTER JAMES: Well  
8 that's not correct because what was the purpose of my  
9 ruling? The whole issue of whether they had to  
10 produce documents was held in abeyance, whether that  
11 was by -- I can't remember whether that was a function  
12 of Judge Farnan's doing or not. I suspect it was.

13 I think, and correct me if I'm wrong, that  
14 months, perhaps even more passed before the matter of  
15 what was within the scope of discovery was finally  
16 directed to me.

17 Are you saying that they had an obligation  
18 to start collecting let's say, certainly not producing  
19 because they had filed a motion, documents which in  
20 the end I determined weren't even relevant or should  
21 not be produced?

22 MS. STEINGART: On September 29th Judge  
23 Farnan denied their request for protective order and  
24 denied it in the broadest possible terms. There were

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1 SPECIAL DISCOVERY MASTER JAMES: I must  
2 say that this is one of the less arguable pullback  
3 provisions that I have seen and one phrase that  
4 bothers me is in the first sentence, I guess, "shall  
5 promptly notify all receiving parties in writing of  
6 such inadvertent production."

7 Now, it's your position, I believe, that  
8 promptly notify means that they have to promptly  
9 notify you of the inadvertent production after the  
10 production as opposed to when they discover it?

11 MS. STEINGART: No. It's my view that  
12 they reviewed these productions already and they made  
13 a request back that didn't include these documents, so  
14 they had notification when they first tried to claw  
15 things back that their discovery, that their  
16 productions were flawed.

17 And this goes to another part of  
18 inadvertence here. We have been -- you know,  
19 inadvertence and the issue of inadvertence has been at  
20 the heart of this. They knew by my letters to them  
21 that I questioned inadvertence from the get-go. There  
22 was no explanation back about inadvertence.

23 And, indeed, as we sit here today, there's  
24 been no sworn statement provided that says we had this

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1 a core and a body of documents that anyone in good  
2 faith would know that in this situation had to be  
3 produced. Maybe it was half. Maybe it was a third.  
4 But they had to know that a substantial part of the  
5 production was going to be called for.

6 And then when we appeared before Your  
7 Honor, they said that they would roll, a rolling  
8 production.

9 SPECIAL DISCOVERY MASTER JAMES: A rolling  
10 production?

11 MS. STEINGART: Yes. And we had a lot of  
12 rolling towards the end. And then you gave them an  
13 option. You gave them an option that for good cause  
14 shown they could come back, they could come back for  
15 an extension on the production. They could come back  
16 for an extension on the privilege log. They could  
17 have asked us for a stipulation. They could have done  
18 101 things, but they didn't. Okay?

19 They kept within the time frame and to the  
20 extent that errors were made when we got the three  
21 requests for return over a long period of time we  
22 thought the errors were caught. We had every reason  
23 to believe that this was a second-guessing of  
24 decisions that had already been made.

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1 process and this is why it failed here and this is why  
2 it failed here and this is the good faith process we  
3 had to catch this. There's no reason why I should sit  
4 and think I only got the first three requests because  
5 they're technical glitches and they had some other  
6 supervening system in place.

7 My idea of promptly is once you realize  
8 there are flaws that it means that you have notice and  
9 that anything thereafter has to be taken from the time  
10 that you first had notice of your glitches, that you  
11 first had notice of problems with your production.  
12 And, indeed, when we get to March 23rd, when we begin  
13 to have a reevaluation of the production and documents  
14 produced that are withheld -- and some of those have  
15 been asked to be returned. Some of the documents that  
16 they gave us on March 23rd where they say we've given  
17 you these documents late because we did a privilege  
18 review and we decided these aren't privileged; they  
19 changed their minds on some of those.

20 And all of those factors led us to believe  
21 that this was merely a change of heart and that  
22 inadvertence has to be taken from the first time or  
23 notice so that we can measure promptness. It has to  
24 go back to December, January, February when they made

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1 those initial clawbacks. That's why we believed it  
2 wasn't prompt. And when we asked for explanation, we  
3 didn't get explanation. We just got you're not even  
4 allowed to ask these questions.

5 And we didn't write a letter that said  
6 look, we don't accept your characterizations; give us  
7 an explanation about why. We wrote a letter that said  
8 exactly why we thought it didn't meet these standards,  
9 the things that we considered. And we still received  
10 no response about why each of the things that we said  
11 led it to not come within the order were incorrect.

12 SPECIAL DISCOVERY MASTER JAMES: Let's  
13 focus on promptness just in terms of production. I  
14 mean, promptness is such a relative term. Why isn't  
15 it prompt even if it's two months after the fact of  
16 production if you're focusing on production as opposed  
17 to time of discovery? Why isn't that prompt in this  
18 case? Because we know from the case law that there  
19 have been cases that held eight months is prompt.

20 MS. STEINGART: Right. Right. As to some  
21 of the documents I think that our view as to the  
22 requests for return of documents that occurred that  
23 were part and parcel of productions that were already  
24 clawed back and as part and parcel of the March 23rd

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1 if you look at the Hylland report, at the thousands of  
2 pages, many of the exhibits are not privileged and  
3 then there's separate things that they have asked for  
4 back that aren't part of the Hylland report, like  
5 Mr. Hylland's resume that's clearly not privileged.  
6 And then there are things that they have asked for  
7 back that they now include in the most recent letter  
8 that they provided to the Court where they have  
9 changed their mind on privilege altogether.

10 So I think that we have a basis for  
11 questioning inadvertence.

12 SPECIAL DISCOVERY MASTER JAMES: I assume  
13 that of the documents produced you would agree, or  
14 maybe you wouldn't, that apart from the inadvertent  
15 perhaps waiver that they are privileged and if I find  
16 that they should be returned you would do so in honor  
17 of the privilege or am I incorrect, that basically  
18 everything in these six binders in your view is not  
19 privileged?

20 MS. STEINGART: Well, there are things  
21 that are not privileged because of the waiver because  
22 it was not inadvertent.

23 SPECIAL DISCOVERY MASTER JAMES: Put aside  
24 that issue. Put aside that issue and out of your

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1 production that many of the documents don't come  
2 within paragraph 8 because of lack of inadvertence and  
3 others of the documents don't come into 8 because  
4 they're prompt. It's not a matter of all the  
5 documents not being prompt, but I think a good portion  
6 of them weren't prompt.

7 And we can, you know, slice and dice the  
8 request for return of documents and see which ones  
9 were part of which productions and we can talk about  
10 promptness in tranches of documents, if that's more  
11 helpful.

12 But from our point of view the ones that  
13 came from the earlier production and the ones that  
14 came from the March 23rd production, well, that all of  
15 them were not inadvertent because I think that we have  
16 a problem that we don't know the system and, you know,  
17 we don't know that there was the degree of care taken  
18 that would lead you to determine that they were  
19 inadvertent. Certainly we don't think so.

20 And as to the later stuff -- as to the  
21 earlier things we don't think it was prompt. So it's  
22 really not -- well, all of it is not inadvertent, much  
23 of it is not prompt.

24 And then you have the other tranche where

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1 mind. Take this hypothetical.

2 MS. STEINGART: Okay.

3 SPECIAL DISCOVERY MASTER JAMES: They're  
4 all going to go back to them, let's say.

5 MS. STEINGART: Okay.

6 SPECIAL DISCOVERY MASTER JAMES: Are some  
7 of them privileged and some of them not or are they  
8 all non-privileged based on you've looked at them?

9 MS. STEINGART: Many of them are not  
10 privileged. Most of them are not privileged.

11 SPECIAL DISCOVERY MASTER JAMES: Most of  
12 them but some are?

13 MS. STEINGART: Some are privileged. I  
14 have to say I could not give you a page count of the  
15 ones that I think are privileged and the ones that are  
16 not because many of the exhibits to Mr. Hylland's  
17 deposition are not, of the special report are not  
18 privileged. They're just not. They're e-mails from  
19 company personnel.

20 SPECIAL DISCOVERY MASTER JAMES: So with  
21 respect to the documents that you would argue are not  
22 privileged, how will you be prejudiced if I order that  
23 those documents be destroyed or returned? Because  
24 you're obviously in a position to file another motion

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1 and argue that those documents are not privileged  
2 because they don't meet the standards of the  
3 appropriate rule.

4 MS. STEINGART: Well, I would certainly  
5 hope that all of that could be encompassed in the  
6 exercise that we're here for. But if a separate  
7 motion would be necessary, then certainly if that's,  
8 if that's what you decide, that is certainly something  
9 that we would do.

10 SPECIAL DISCOVERY MASTER JAMES: Well, you  
11 say that could be part of this exercise, but that's  
12 not really possible because I haven't seen the  
13 documents and I don't think -- there is nothing in the  
14 record that provides a description of each document  
15 that would give me any idea as to whether it's  
16 privileged or not.

17 I would have to --

18 MR. BREWER: Your Honor, if I could  
19 interject. One of the exhibits we provided is a  
20 chart, it's Exhibit 43 to the declaration we submitted  
21 with our reply brief, that shows the overlap between  
22 the documents subject to the request, requests for  
23 return or destruction, and the documents which they  
24 have admitted were disclosed to the SEC, which is

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1 Ms. Steingart's position on this issue?

2 MR. PIZZURRO: Well, if I understand  
3 Ms. Steingart's argument, and let's try to take it  
4 away from counsel's state of mind which I heard a lot  
5 about as to what they believe, let's talk about, which  
6 I don't know this is necessarily relevant, but it's  
7 what does the stipulation and protective order  
8 provide? What I heard is an argument that production  
9 is not inadvertent unless the circumstances of the  
10 production meet the tests that the case law has set  
11 out where it does not find a waiver based on  
12 inadvertence. And that's just sophistry. That  
13 argument just can't go anywhere because, otherwise,  
14 this agreement doesn't mean anything.

15 Inadvertent is not the same as the conduct  
16 that would be required to find that there was no  
17 waiver under the prior case law. This is a  
18 meaningless paragraph if that were the case. So I  
19 don't understand that argument.

20 The only other argument that I heard, I  
21 believe, is that they just don't believe that it was  
22 inadvertent. They just think now that this still was  
23 a litigation tactic that was designed to thwart their  
24 ability to conduct depositions, et cetera, et cetera.

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1 another issue that's teed up for decision today.

2 So, for example, if we were to receive a  
3 ruling that disclosure to the SEC does constitute  
4 waiver, there is a large chunk of the documents in  
5 dispute that can be crossed off on that basis.

6 SPECIAL DISCOVERY MASTER JAMES: I  
7 understand. Right.

8 MS. STEINGART: Right. And in connection  
9 with the motion, we have offered the documents. You  
10 know, we have provided the documents for an in camera  
11 review.

12 SPECIAL DISCOVERY MASTER JAMES: Right  
13 Okay.

14 MS. STEINGART: But certainly to the  
15 extent that it's the desire to have us provide an  
16 item-by-item assessment of what our view of privilege  
17 is, we're certainly happy to do that.

18 SPECIAL DISCOVERY MASTER JAMES: All  
19 right. Both sides have argued the law with respect  
20 to, the case law with respect to whether, putting  
21 aside paragraph 8, this is inadvertent or not. I'm  
22 very familiar with that law. I don't need to ask any  
23 questions about that.

24 Mr. Pizzurro, do you have any response to

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1 Now, I don't think anybody on the other  
2 side of the table is calling me a liar. I swore to it  
3 and I did it as an affidavit and not as a declaration  
4 because I wanted to swear to it. This was  
5 inadvertent, inadvertent in the dictionary sense of  
6 the term. So it was not a litigation ploy.

7 Having said that, I believe that this  
8 provision makes it clear that issue is off the table.  
9 Now, whether there are other bases for them to  
10 challenge the privilege is clearly up to them, but the  
11 fact or circumstances of the inadvertent production is  
12 not open to them. That's what Judge Farnan ordered.  
13 That's what they agreed.

14 And to take out the word inadvertent --  
15 another thing that Ms. Steingart said is well, that  
16 doesn't make any sense; just take the word inadvertent  
17 out. No, that would make no sense at all because that  
18 would mean that -- you know, clearly a party can waive  
19 attorney-client privilege. You can make a conscious  
20 waiver and you can produce a document which otherwise  
21 maybe you have an argument is attorney-client  
22 privilege and that can be waived under circumstances.

23 So you wouldn't -- no one would have a  
24 provision, a clawback provision which simply said it



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1 takes away the ability to waive the privilege. That's  
2 nonsensical. I really don't think there can be any  
3 dispute as to what the plain meaning of these words  
4 mean and the plain intent of the clawback provision  
5 was/ and to state what counsel may have believed or  
6 not have believed is not relevant.

7 SPECIAL DISCOVERY MASTER JAMES: Anything  
8 else?

9 MR. PIZZURRO: No.

10 SPECIAL DISCOVERY MASTER JAMES: All  
11 right.

12 There are a number of issues today that  
13 I'm going to take under advisement and issue an  
14 opinion later, unfortunately, because I think that  
15 time is very important in this case. You're on a very  
16 prompt schedule and I want to keep everyone on that  
17 schedule. It's unfortunate that the Court took  
18 several weeks before deciding that this should be  
19 referred to me.

20 Therefore, in keeping with my interest and  
21 your interest in having these issues teed up  
22 immediately, this is one issue that I'm going to rule  
23 on today and it will be part of this transcript.

24 I'm going to grant the motion of

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1 have been produced or discovered or notice may not  
2 have been given in as timely a fashion as might  
3 otherwise have been the case in a perfect world.

4 This particular provision as written is  
5 very open-ended and liberal. Many of these provisions  
6 contain specific time periods in which the parties are  
7 expected or are limited in their ability to raise  
8 inadvertent production either from the date of  
9 production or from the date of discovery. Some of  
10 them are done in two-tier fashions; that if a certain  
11 number of days have passed and a party raises the  
12 issue, if a certain number of days have passed since  
13 the production and within that time period a request  
14 is made for the pullback, then there's no argument.  
15 And they also provide a second time period; that if  
16 the discovery is made within that period, well, then,  
17 the inadvertent production issue will be discussed or  
18 will be argued as to whether it was, in fact,  
19 inadvertent. That could have been done here. It was  
20 not.

21 The only provision that gives me pause is  
22 the provision that requires the party asserting that  
23 the documents were inadvertently produced to provide  
24 prompt notice. It's unclear whether it's prompt

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1 NorthWestern and deny the motion of Magten with  
2 respect to this issue relating to the inadvertent  
3 production of documents. The basis for my ruling is  
4 the clear, unequivocal language in paragraph 8 of the  
5 stipulation and confidentiality order signed by Judge  
6 Farnan and approved by the parties on I believe March  
7 21.

8 This is a classic clawback provision,  
9 pullback provision. It would serve absolutely no  
10 purpose except be a license for litigating  
11 inadvertence given the interpretation that Magten has  
12 placed on it. In my 28 years of experience in these  
13 courts I have seen many, many versions of these types  
14 of agreements. In fact, as I've said before, I've  
15 seen more than probably any judge sitting on this  
16 Court. This is the first time I've ever heard a party  
17 argue, take the position that Magten is arguing here  
18 because it destroys the total utility of such a  
19 provision.

20 Now, I say this. I'm mindful of the  
21 position in the record and the position Ms. Steingart  
22 has articulated today that there are questions about  
23 whether these documents may be privileged. There are  
24 questions that but for this provision these may not

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1 notice in relationship to the production or prompt  
2 notice in relationship to the discovery.

3 Given the liberal and broad scope of this  
4 provision, I think it's reasonable to construe it as  
5 giving prompt notice after discovery that the  
6 inadvertent production happened and that's I think a  
7 reading consistent with the rest of the terms of this  
8 particular provision.

9 Even if one looked at it in terms of  
10 promptly seeking the documents after they were  
11 produced, given the relatively short period of time  
12 during which documents have been produced in this case  
13 beginning last fall through March, I don't necessarily  
14 based on the record before me agree, and I don't  
15 agree, with Magten's position that the notice here was  
16 not prompt.

17 Therefore, in accordance with paragraph 8  
18 of the confidentiality order, I'm ordering Magten to  
19 either destroy the documents in question or to return  
20 them along with any work product reflecting the  
21 contents of such materials by Wednesday of next week,  
22 whatever date in May that is.

23 I am not going to award sanctions to  
24 either party with respect to this aspect of this

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1 particular motion.

2 Do we need a recess? Does anyone need to  
3 go off before we go to the next issue?

4 Okay. We're up to paragraph 3 of the  
5 letter, my letter of the 17th, which is with respect  
6 to the plaintiffs' motion referenced in paragraph 1  
7 above whether NorthWestern's identification of certain  
8 documents is privileged after the fact discovery  
9 cutoff constitutes a waiver of privilege as to those  
10 documents.

11 This is Magten's motion, so I will let  
12 Ms. Steingart set forth your position.

13 MS. STEINGART: Well, the last time we  
14 were before the special master there was a direction  
15 to produce documents by the 16th and a privilege log  
16 by the 23rd, unless good cause was shown. And as we  
17 understand it and as we have understood practice in  
18 this jurisdiction that to the extent that a party  
19 believes it is unable to comply with a discovery  
20 cutoff that there is a necessity that at least a  
21 motion be made asking for some additional time or a  
22 stipulation be requested.

23 And here in this instance neither of those  
24 things occurred. And we think that because of that

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1 MR. BREWER: 150 documents.

2 SPECIAL DISCOVERY MASTER JAMES:  
3 Documents.

4 MR. BREWER: And the first supplement was  
5 put out I want to say it was April 5th. It  
6 accompanied one of their return demand letters. The  
7 second supplement was I want to say April twenty-  
8 something. I'm sure it's in the record. It was a bit  
9 later.

10 And some, but not all, of the documents of  
11 these supplements were also subject to the return  
12 demands, so there there might be an issue as to  
13 whether the interplay between inadvertence and  
14 discovery and the issue, but there are also, I  
15 believe, 80 or 90 documents that were not logged by  
16 March 23rd that they never produced to us, at least  
17 they haven't asked for them back, so the issues there  
18 may be a bit different.

19 SPECIAL DISCOVERY MASTER JAMES: Now, you  
20 supplied some case law that supports your position,  
21 correct?

22 MS. STEINGART: We did.

23 SPECIAL DISCOVERY MASTER JAMES: Yes. And  
24 this raises an issue that I'm going to have to grapple

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1 and because all parties understood what the directions  
2 were that that constitutes a waiver of the issue and I  
3 think it's as simple as that. I don't think it was a  
4 complicated cutoff to be aware of, nor was  
5 NorthWestern not in doubt about the issues that it was  
6 confronting with respect to privilege.

7 So I think that requesting such an  
8 extension so that everyone knew that these subsequent  
9 requests might be made and difficulties avoided would  
10 have been a very simple and straightforward thing to  
11 do.

12 SPECIAL DISCOVERY MASTER JAMES: Now, how  
13 many privilege documents were identified after March  
14 the 23rd?

15 MS. STEINGART: Well, in one of the  
16 requests there were 90 additional documents and I  
17 think, I think that was on April 5th.

18 MR. BREWER: I can give you an exact  
19 number, Your Honor.

20 Their original log ended with number 1625  
21 and their two supplements get up to 1773, so that's,  
22 well, very close to 150.

23 SPECIAL DISCOVERY MASTER JAMES: Pages?

24 MS. STEINGART: Documents.

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1 with on a number of these motions and that is where  
2 do -- well, which law of which jurisdiction should  
3 govern these disputes? In fact, I think the same,  
4 well, there may be a slightly different issue with  
5 respect to the motions for protective order as to the  
6 depositions of Messrs. Kindt and Hanson.

7 But at least with respect to this motion,  
8 what is your position as to which jurisdiction's law  
9 controls or in your mind is there no conflict?

10 MS. STEINGART: Well, I think that with  
11 respect to, you know, if this is not an issue that is  
12 governed by the procedural and practice rules of this  
13 jurisdiction, because I think that to some extent this  
14 is not substantive, this is a procedural issue, you  
15 know, how the orders of the Court are treated and what  
16 obligations those who practice before the Court have  
17 if there is some issue about compliance and timing.  
18 And those issues apply even if people know they're  
19 late, they still make a motion saying I'm five days  
20 late and this is the good cause and please grant  
21 permission. And in here none of those either before  
22 or after or at any time was a request made to extend  
23 or good cause shown.

24 SPECIAL DISCOVERY MASTER JAMES: Right

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1 So I may have jumped the gun here because this really  
2 deals with --

3 MS. STEINGART: I can get to that issue,  
4 the choice of law, if you would like me to, sir.

5 SPECIAL DISCOVERY MASTER JAMES: I think  
6 you can wait because I think this one is clearly  
7 determined by the procedural rules of this  
8 jurisdiction because it relates to compliance with a  
9 cutoff date as opposed to whether the documents are  
10 privileged themselves.

11 So, Mr. Pizzurro, let's hear from you  
12 about why you haven't waived privilege by identifying  
13 these documents late.

14 MR. PIZZURRO: I think you have to, as  
15 Mr. Brewer said or or maybe Ms. Steingart said, you  
16 have to examine two different categories of documents  
17 or two different privilege logs, if you will. There  
18 is a category of documents that were on the first  
19 supplemental privilege log, which was April 5, which  
20 are not subject to the clawback letters and then there  
21 are the remainder on that log and all of the documents  
22 which were on the final supplemental log, which I  
23 believe is April 23 or 24, which are all subject to  
24 the clawback letters.

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1 of days, weeks, not months and not multiple violations  
2 of orders, not a situation like the Congo case and  
3 many others in which the parties simply either  
4 provided no privilege log at all or absolutely failed  
5 to provide the detail in the log that's required by  
6 the Federal Rules.

7 Now, there's no argument that I've heard,  
8 nor can there be one that the privilege logs which  
9 were provided here didn't conform to the requirements  
10 of the rules. They give all the information that the  
11 rules require. They are detailed and they are  
12 voluminous.

13 Now, a ten-day delay between the 23rd of  
14 March and the 5th of April for certain documents which  
15 were not subject to the clawback doesn't even -- it's  
16 not even in any universe of decisions that have been  
17 reported where this kind of sanction has been leveled.

18 It was a situation again that was human  
19 error. The log was being put together by a number of  
20 different individuals and a small portion of the log  
21 which had over 1600 entries was omitted on March 23.  
22 That was discovered when this review began in early  
23 April and as soon as it was discovered, that part of  
24 the log, which was already in existence but simply

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1 Now let's look at the same argument, there  
2 is an argument, and I think this first argument  
3 applies to that entire universe of documents, and that  
4 is there is no law which says that if you have not  
5 provided a privilege log on the date which has been  
6 ordered, certainly in the first instance, that that  
7 constitutes a waiver of the privilege. All of the  
8 case law talks about unjustified and all of the case  
9 law the circumstances of those cases it's very easy to  
10 see the kind of egregious conduct that the party was  
11 engaged in before the Court was pushed to finding that  
12 there was a waiver of the privilege.

13 The case that is relied upon principally  
14 by Magten, which is the Get-A-Grip case, which is out  
15 of Pennsylvania, is probably the least egregious set  
16 of circumstances. That's a case in which the Court  
17 had already set I believe multiple deadlines; the last  
18 deadline the Court had set was slipped or the  
19 producing party let slip by two more months and the  
20 Court was pushed to assessing the sanction of a  
21 waiver.

22 The other cases -- first of all, that's  
23 not anywhere near what we're talking about here with  
24 respect to any of these. We're talking about a matter

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1 hadn't been communicated, was communicated.

2 So I just don't believe that the  
3 circumstances here could possibly warrant the  
4 Draconian remedy or sanction of a deemed waiver of the  
5 privilege. And I think that the circumstances extends  
6 to the others, but with respect to the other entries  
7 on the supplemental log there's another argument here,  
8 and that is if there's a waiver as a result of not  
9 providing those documents on a log that was in  
10 existence on March 23 because you didn't know that  
11 they had been inadvertently produced until sometime  
12 subsequent to that, it essentially is a back door way  
13 of gutting paragraph 8. There's just no way around  
14 that. You would never have the protection of  
15 paragraph 8 if by giving the receiving party the  
16 information to which they are entitled with respect to  
17 those inadvertently produced documents you are, in  
18 effect, waiving the privilege. It just doesn't make  
19 any sense.

20 So I can't, I can't possibly see any basis  
21 for arguing that there is a waiver with respect to  
22 certainly all the documents contained in the clawbacks  
23 because that means we have just back-doored paragraph  
24 8 and with respect to the limited number of documents



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1 which were on the portion of the April 5 log which was  
2 submitted I guess it's about ten days after the  
3 discovery cutoff, given the small amount of documents  
4 in relation to the overall, not only the overall  
5 production but in relation to the number of documents  
6 on the original log and the small amount of time, it  
7 just does not come within any of the case law finding  
8 a waiver under those circumstances.

9 SPECIAL DISCOVERY MASTER JAMES: Did you  
10 consider discussing the problem you've had with  
11 opposing counsel before -- and maybe I'm wrong on  
12 this, but I believe I understand the record to reflect  
13 that you simply filed late the additional log and said  
14 here it is. Is that correct?

15 MR. PIZZURRO: The log with respect to the  
16 90, I take Mr. Brewer's word that it was 90, of the 90  
17 documents which are on the log that was on April 5,  
18 and there are additional documents which were the  
19 clawback documents, we had just, we had just provided  
20 them with the supplemental log. At that point I  
21 believe, however, the parties had, you know, already  
22 been engaged in a bit of a battle over this and I  
23 think we had already been told at that point by  
24 counsel that they were under no obligation under

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1 if you recall there are a couple of more letters in  
2 that interim, so the second supplemental log contains  
3 the entries for all of those subsequent clawback  
4 requests identifying them as required by the rules.

5 SPECIAL DISCOVERY MASTER JAMES:  
6 Ms. Steingart.

7 MS. STEINGART: I think that the issue  
8 here is twofold. I think, one, it's a requirement  
9 that some requests be made either before or after for  
10 relief from the order and that none, no such request  
11 was made before or after. And I think that's more  
12 than a technical issue in a situation where we have a  
13 party that has been resisting discovery to the letter,  
14 to the edge. And I think that's something that  
15 everyone is entitled to do, Your Honor. You know, I  
16 think that to the extent people want to play, you  
17 know, out the discovery process by insisting that no  
18 line ever be crossed for any reason whatsoever, you  
19 know, and resisting discovery as much as may be, I  
20 think that's fine, but then I think you're also held  
21 on the other side to the same rules that you are  
22 imposing. That is number one.

23 Number two, I don't think that  
24 inadvertence can be assumed. I don't understand that

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1 paragraph 8 and they were going to continue to use the  
2 documents as they saw fit. That was Mr. Brewer's  
3 earlier letter.

4 Ms. Steingart subsequently it's true in a  
5 conversation with me said that that was not going to  
6 be the case, but as far as we knew at that point in  
7 time there was really no point in trying to have  
8 discussions until we could be assured that our  
9 documents were going to be given the protections to  
10 which they were entitled under paragraph 8.

11 SPECIAL DISCOVERY MASTER JAMES: Just so  
12 am clear on the distinction between April 5 and April  
13 23, April 23 is a log that incorporates only the  
14 documents that you claim were inadvertently produced  
15 and that you were seeking back, seeking to have  
16 returned subject to paragraph 8?

17 MR. PIZZURRO: Not quite. The first  
18 supplemental log which was provided on April 5 has on  
19 it two categories of documents. It has documents  
20 which should have been on the original privilege log  
21 and were not subject to the clawback letters that were  
22 extant on April 5 and included the documents which  
23 were in the clawback letters as of that date, April 5.

24 The subsequent supplemental log, because

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1 the burden of having admittedly done prior reviews of  
2 these documents and having this slip through and then  
3 going back means that someone can say my log was late  
4 because it was inadvertent if there's a significant  
5 question about inadvertence. You know, I think it's  
6 late. So I don't think that it's circular. I don't  
7 think -- you know, I think that it bespeaks the same  
8 kind of issue or the same kind of arrogance that  
9 pertains to not either seeking before or after the  
10 fact relief from the date and then accepting the  
11 burden of good cause shown. That's what the ruling  
12 was here, and I can read it to you.

13 It said upon good cause shown March 23rd,  
14 March 16th. I think if they want to rely on  
15 inadvertence, if they want to rely on these things,  
16 they have to make a motion and show good cause. And  
17 don't think that's been done in any way, shape or  
18 form.

19 So I think that we're back unfortunately  
20 somewhat to that issue. And while I understand that  
21 NorthWestern regards this as a Draconian remedy, I  
22 think that either in their moving papers or their  
23 reply or in any of the various things that have been  
24 submitted here there has been no such showing.

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1 MR. BREWER: If I could just clarify one  
2 fact. There have been -- there were a lot of letters  
3 back and forth between the parties and it's very easy  
4 to get the sequence muddled. I just wanted to clarify  
5 one point Mr. Pizzurro had made where I think he  
6 inadvertently got muddled, if I could use that word.

7 MR. PIZZURRO: It's entirely possible.

8 MR. BREWER: We got the first supplemental  
9 log, which is the one that also includes these  
10 documents with the clawback, was sent on March 5th.  
11 This was the one that was sent at 11:00 p.m. on March  
12 5th and because of the holidays frankly none of us  
13 looked at until the following Monday when I was back  
14 in the office and --

15 SPECIAL DISCOVERY MASTER JAMES: Did you  
16 say March 5th or April 5th?

17 MR. BREWER: I'm sorry. April 5th. It  
18 was one of those Monday-Thursday.

19 That had the supplemental, this first  
20 supplemental log which included both thirty-odd  
21 clawback documents that were simultaneously being  
22 referred to in the covering letter and about 90 other  
23 miscellaneous things. They had not contacted us prior  
24 to that as best as I recall and said we need to

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1 page?

2 MS. STEINGART: I'm on page 150 of the  
3 2007 edition and I'm at the bottom of that page.

4 And it's saying that in 1993 that  
5 paragraph 5, which required the privilege log, is a  
6 new provision, quote, a party must notify other  
7 parties if it is withholding materials otherwise  
8 subject to disclosure under the rule or pursuant to a  
9 discovery request because it is asserting a claim of  
10 privilege or work product protection. To withhold  
11 materials without such notice is contrary to the rule,  
12 subjects the party to sanctions under Rule 37(b)(2)  
13 and may be viewed as a waiver of the privilege or  
14 protection.

15 So from the get-go that is an available  
16 remedy where the privilege log, either the deadline or  
17 some other aspect of delivering a privilege log is not  
18 complied with.

19 SPECIAL DISCOVERY MASTER JAMES: All  
20 right. Anything else?

21 MS. STEINGART: That's all. Thank you.

22 MR. PIZZURRO: A couple of points. First  
23 of all, we couldn't have provided the small portion of  
24 the privilege log on April 5 which should have been

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1 supplement our log because we missed a few things.  
2 My letter to Mr. Pizzurro or one of his  
3 colleagues that he, rightly or wrongly, took to mean  
4 it was not productive to talk to us was the following  
5 week, I think was the Wednesday of the following week.  
6 So whatever good reasons they may have had for not  
7 wanting to talk to us in advance about the need to  
8 supplement their log, something hadn't been, some word  
9 processing glitch had kept something from getting  
10 stuck in the final document, it was prior to that,  
11 that letter he referred to. But there were a lot of  
12 things going back and forth.

13 MR. PIZZURRO: That's entirely possible.  
14 Let me make a point, if I could.

15 MS. STEINGART: Could I just finish?

16 MR. PIZZURRO: I'm sorry.

17 MS. STEINGART: Just one last point. It  
18 does say in the notes to the rule that the privilege  
19 log, and this is what it says --

20 SPECIAL DISCOVERY MASTER JAMES: Reading  
21 from?

22 MS. STEINGART: I'm reading from the  
23 committee notes to Rule 26(b)(5).

24 SPECIAL DISCOVERY MASTER JAMES: What

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1 and was prepared to be submitted on March 23rd until  
2 then because we didn't know that that, in fact, had  
3 occurred and as soon as we discovered it, we  
4 immediately provided it.

5 So the terms of Your Honor's order were  
6 that we were required to have substantially completed  
7 our production of documents in response to the two  
8 requests except for good cause shown no later than  
9 March 16 or the privilege log relating to that  
10 production no later than March 23.

11 Now, I don't know. The way -- I'm parsing  
12 Your Honor's words and Your Honor knows what he meant  
13 better than I do, I suppose, but substantial  
14 compliance except for good cause shown. We're talking  
15 about it's less than a percent, unless my math is way  
16 off, of the documents that should have been on but  
17 were not on the March 23 privilege log that were  
18 provided on a privilege log ten days later. That I  
19 think comes pretty close to substantial performance.

20 And if it's 9 percent, I'll take it. Whatever the  
21 math is, it is a very small, very small percentage.

22 So, again, the case law I think makes very  
23 clear that the courts are not going to find a waiver  
24 of the privilege under these kinds of de minimis

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1 circumstances.

2 The second part of the argument that  
3 Ms. Steingart made I think just demonstrates the point  
4 that I made, and that is she's back to arguing that we  
5 haven't demonstrated inadvertence and if we hadn't  
6 demonstrated inadvertence, then we can't say there's a  
7 late privilege log. Well, I believe we have had a  
8 ruling on that and that's over with. That argument  
9 has been put to rest.

10 So the only possible result to finding a  
11 waiver with respect to the entries which are on the  
12 supplemental logs related to the clawback letters is  
13 to effectively gut paragraph 8.

14 SPECIAL DISCOVERY MASTER JAMES: Thank  
15 you. All right. I'm going to take this paragraph  
16 under advisement.

17 Let's take a short break. Five minutes.

18 MS. STEINGART: Thank you.

19 (A brief recess was taken.)

20 SPECIAL DISCOVERY MASTER JAMES:  
21 Proceeding to the next issue, it's paragraph 4 of my  
22 letter of yesterday, with respect to the plaintiffs'  
23 motion referenced in paragraph 1 above whether the  
24 disclosure by NorthWestern to the SEC of allegedly

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1 fraudulent conveyance that provides the rule of  
2 decision.

3 In terms of all of the motions to dismiss  
4 that were made, the motions for summary judgment by  
5 the defendants in Montana, plus the motions made  
6 before Judge Case and Judge Peterson, everyone relied  
7 on Montana law as the rule of decision. Indeed, even  
8 if we look at the Delaware court in this situation  
9 that would be sitting and determining this issue, if  
10 the Delaware court as it wants applies the substantial  
11 contacts analysis, the law to be applied would be  
12 Montana law. All of the transactions and the  
13 occurrences occurred here, all of --

14 SPECIAL DISCOVERY MASTER JAMES: "Here"  
15 you mean Montana?

16 MS. STEINGART: In Montana. All of the  
17 persons, or South Dakota, all of the persons that  
18 undertook the actions that are the subject of the  
19 disputes here acted there. The meetings and  
20 preparation of materials that are the subject of the  
21 motion here were created there by persons who resided  
22 there.

23 Indeed, in the restatement of law,  
24 conflict of law would require the application of

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1 privileged documents waived the privilege as to those  
2 documents.

3 I'm going to start with Magten, again  
4 because it's Magten's motion.

5 This is where I would like some thoughts  
6 on choice of law.

7 MS. STEINGART: Okay. This is an issue  
8 that was somewhat previewed the last time we were  
9 here. We talked about the production of material that  
10 had been given to the SEC and we also talked about  
11 production of privileged material that had been  
12 provided to the SEC because there had been a selective  
13 waiver by NorthWestern in connection with the  
14 investigation of NorthWestern by the SEC.

15 Now, we are in the adversary proceeding  
16 concerning Magten's and Law Debenture's claims against  
17 NorthWestern concerning fraudulent conveyance. In a  
18 bankruptcy court what a bankruptcy court usually does  
19 in an adversary is apply state law if state law  
20 provides the rule of decision. In the adversary  
21 proceeding concerning Magten, Law Debenture and  
22 NorthWestern, in addition to the adversary proceeding  
23 that involves the two individuals, the applicable law  
24 is Montana law. It's Montana law concerning a

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1 Montana or South Dakota law under these circumstances.

2 SPECIAL DISCOVERY MASTER JAMES: I want to  
3 stop you there because the reason I asked this was I  
4 don't have enough knowledge about the background of  
5 the merits of the claim to be as informed on this as  
6 you are.

7 You indicated Montana. Now, I've been  
8 reading in the materials provided to me with respect  
9 to these motions about the South Dakota nexus. As I  
10 understand it, NorthWestern, its corporate  
11 headquarters have at all times relevant to this  
12 litigation been in Sioux Falls, South Dakota. Is that  
13 correct?

14 MS. STEINGART: That's correct.

15 SPECIAL DISCOVERY MASTER JAMES: So  
16 educate me as to why Montana versus South Dakota.

17 MS. STEINGART: Right. It has been argued  
18 from the filing of the adversary proceeding that it's  
19 Montana fraudulent conveyance law that will determine  
20 whether a fraudulent conveyance has occurred here.

21 SPECIAL DISCOVERY MASTER JAMES: Let me  
22 stop you there. I thought the decision of the  
23 bankruptcy court was that there was no fraudulent  
24 conveyance argument that you could make, but you could

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1 make an argument based on common law fraud. Is that  
2 incorrect?

3 MS. STEINGART: What the Court said is  
4 that if there was an overarching fraud that impacted  
5 the transfer of assets from Clark Fork to NorthWestern  
6 that we would not lose our standing as creditors of  
7 Clark Fork to challenge the transfer.

8 In other words, to the extent that the  
9 fraud was a bigger fraud because it involved both  
10 movement of assets and liabilities, you can't say  
11 because I did a bigger fraud you lose standing to  
12 challenge. So the holding of the bankruptcy court was  
13 that if we could show an overarching fraud under  
14 Montana law, under any law, that would permit us to  
15 not be deprived of our ability to assert the disparity  
16 in value of assets and liabilities.

17 SPECIAL DISCOVERY MASTER JAMES: Okay.  
18 Now, as I understand the going flat transaction  
19 allegations, the overarching fraud would have emanated  
20 from the actions or lack of actions taken by the  
21 officers and directors of NorthWestern as opposed to  
22 the subsidiary Clark Fork which was merged into the  
23 parent and those actions would have been taken in  
24 South Dakota, wouldn't they?

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1 MS. STEINGART: Right. I think those  
2 actions were taken both in South Dakota and Montana.  
3 I think the corporation had offices and headquarters,  
4 though its main offices were in Sioux Falls, I think  
5 it had a presence in both places and certainly was  
6 answerable to regulatory authorities because the bulk  
7 of its energy assets were located in Montana.

8 And so the law applied thus far to all of  
9 the decisions concerning the claims, concerning the  
10 existence of the claims, the scope of the claims, the  
11 viability of the claims have all been the rule of  
12 decision that's not Delaware law because really the  
13 decision here is Delaware or not Delaware because  
14 Delaware is the only jurisdiction that's relevant here  
15 that in a lower court decision accepted selective  
16 waiver.

17 And even when you look at Westinghouse,  
18 which is a Third Circuit decision, that was a  
19 diversity case. Westinghouse was a Delaware company  
20 and the law applied was New Jersey law because New  
21 Jersey law applied the rule of decision in the  
22 substantive dispute that was being litigated.

23 SPECIAL DISCOVERY MASTER JAMES: I guess  
24 my problem is when I make a decision on this I'm not

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1 sure I know whether I should choose Montana or South  
2 Dakota or whether it makes any difference. The fact  
3 that -- and maybe your adversaries will take a  
4 different position. Maybe they agree that I don't  
5 need to worry about this. Maybe it is just Montana or  
6 Delaware.

7 But from your perspective, I need to know  
8 whether it should be South Dakota or Montana.

9 MS. STEINGART: I think from my  
10 perspective it's Montana. But I do think that whether  
11 it's South Dakota or Montana would not yield a  
12 different result. I think both of them do not, do not  
13 have any authoritative decision that adopts selective  
14 waiver. And, indeed, the vast majority of courts that  
15 have considered the issue have rejected selective  
16 waiver for any number of good and sufficient reasons  
17 and, indeed, federal courts that have dealt with the  
18 issue subsequent to the lower court decision in  
19 Delaware have rejected that, have rejected the  
20 analysis from the Saito decision and rejected any  
21 notion of selective waiver.

22 SPECIAL DISCOVERY MASTER JAMES: Remind  
23 me. Did you cite any Montana decisions in your  
24 papers? I don't seem to recall any.

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1 MS. STEINGART: No, we didn't.

2 MR. BREWER: No. I don't think either  
3 party could find any --

4 MS. STEINGART: There were none. There  
5 were none.

6 MR. BREWER: -- on point, so the  
7 assumption is that they follow the majority rule, the  
8 majority national rule absent any indication to the  
9 contrary.

10 MS. STEINGART: Right. And certainly  
11 there's nothing that would suggest that selective  
12 waiver would be adopted by them.

13 SPECIAL DISCOVERY MASTER JAMES: Now, one  
14 thing I was considering was whether to hold up my  
15 decision pending further submissions by both sides on  
16 whether it's Montana, what Montana law says about  
17 this.

18 But am I hearing from you that you have  
19 looked and as far as you can tell, there's no law that  
20 addresses this issue?

21 MS. STEINGART: Right.

22 SPECIAL DISCOVERY MASTER JAMES: Have you  
23 looked at South Dakota?

24 MS. STEINGART: Yes. We have looked at



<p style="text-align: right;">Page 82</p> <p>1 South Dakota.</p> <p>2 SPECIAL DISCOVERY MASTER JAMES: And</p> <p>3 nothing there either?</p> <p>4 MS. STEINGART: No.</p> <p>5 SPECIAL DISCOVERY MASTER JAMES: All</p> <p>6 right. Sorry. Go ahead.</p> <p>7 MS. STEINGART: So given that in the Third</p> <p>8 Circuit there is no district court, whether applying</p> <p>9 federal law or applying local law, that has ever</p> <p>10 issued a decision in favor of selective waiver and</p> <p>11 that here if we look at the applicable law there is no</p> <p>12 decision that endorses selective waiver.</p> <p>13 It seems to me that the only result that</p> <p>14 is possible is that the materials provided to the SEC</p> <p>15 that fall within the categories of materials that the</p> <p>16 Court has previously found to be producible be</p> <p>17 provided to us.</p> <p>18 SPECIAL DISCOVERY MASTER JAMES: You</p> <p>19 mentioned the restatement. Run me through the</p> <p>20 restatement analysis and why you think that would</p> <p>21 point to my reliance on Westinghouse instead of Saito.</p> <p>22 MS. STEINGART: Under the restatement,</p> <p>23 evidence that is not privileged under the local law of</p> <p>24 the state which has the most significant relationship</p>	<p style="text-align: right;">Page 84</p> <p>1 the Congress is considering whether to amend the rules</p> <p>2 of privilege to change the result basically of</p> <p>3 Westinghouse and to follow the Circuit's decision on</p> <p>4 selective or partial waiver, which is a distinction I</p> <p>5 still can't quite understand.</p> <p>6 But, in any event, what, if any, effect</p> <p>7 does that have on your argument?</p> <p>8 MS. STEINGART: Well, I think at this</p> <p>9 point that amendment of the rule has been rejected and</p> <p>10 I think that as a result of the rejection, it makes</p> <p>11 the appropriateness of following the Westinghouse</p> <p>12 decision more compelling. So I do think that given</p> <p>13 the way a Delaware court would look at this issue or</p> <p>14 the way a federal court would look at this issue or</p> <p>15 the way the federal court would look at a Delaware</p> <p>16 court looking at this issue, because we do have those</p> <p>17 lenses when we're in this context, I think each of</p> <p>18 those perspectives yield the same conclusion and I</p> <p>19 think that's precisely the analysis that took place in</p> <p>20 Westinghouse, which was a Delaware company.</p> <p>21 SPECIAL DISCOVERY MASTER JAMES: Now, I</p> <p>22 assume that all the SEC documents are identified on</p> <p>23 the privilege log of NorthWestern?</p> <p>24 MS. STEINGART: At this point I think they</p>
<p style="text-align: right;">Page 83</p> <p>1 with the communication will be admitted even though it</p> <p>2 would be privileged under the local law of the forum</p> <p>3 unless admission of such evidence is contrary to</p> <p>4 strong public policy of the forum. And the forum with</p> <p>5 the most significant contacts to this case and,</p> <p>6 indeed, the forum whose law would apply here would be</p> <p>7 Montana law. And given that analysis and given that</p> <p>8 principle, that guiding principle in determining</p> <p>9 privilege, we believe that selective waiver would not</p> <p>10 be adopted there certainly and that since it does have</p> <p>11 the greatest contacts that, you know, that their</p> <p>12 material should be produced.</p> <p>13 There's no nexus, there's no nexus between</p> <p>14 the actions that are subject to adjudication and</p> <p>15 events or people in Delaware. You know, so it's not</p> <p>16 only the presence of substantial activity and the rule</p> <p>17 of decision from another jurisdiction, but it's also</p> <p>18 the absence of any activity or by persons or by the</p> <p>19 company here. All the activity was elsewhere.</p> <p>20 So I think that's compelling.</p> <p>21 SPECIAL DISCOVERY MASTER JAMES: Now, one</p> <p>22 of the things referenced in NorthWestern's opposition</p> <p>23 to this motion was the fact that obviously this is a</p> <p>24 very timely and very controversial issue and of course</p>	<p style="text-align: right;">Page 85</p> <p>1 are.</p> <p>2 MR. BREWER: If I could correct on that.</p> <p>3 I think that's --</p> <p>4 MS. STEINGART: That's right. The last</p> <p>5 tranche did not.</p> <p>6 MR. BREWER: I think that's not the case.</p> <p>7 MS. STEINGART: When we first received the</p> <p>8 privilege log, as you could tell from the</p> <p>9 correspondence, although we asked for SEC distribution</p> <p>10 to be identified, because they were a third party, it</p> <p>11 wasn't. After some going back and forth, we received</p> <p>12 that information. And on the April 24th privilege log</p> <p>13 which lists a number of items that return was sought</p> <p>14 on, there is no indication about whether they were</p> <p>15 provided to the SEC or not. These were not documents</p> <p>16 previously on the privilege log, so we don't know the</p> <p>17 status of those with respect to the SEC.</p> <p>18 MR. BREWER: If I can, the chart that we</p> <p>19 provided with our reply papers that shows for all the</p> <p>20 items in dispute whether they were provided to the SEC</p> <p>21 or not, it says yes, blank or question mark. And the</p> <p>22 question mark is where generally because it was the</p> <p>23 ones that were provided that were clawed back later,</p> <p>24 logged late or for other reasons we were unable to</p>

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1 correlate the document to the list they had given us  
2 of which items on the privilege log had been provided  
3 to the SEC.  
4 SPECIAL DISCOVERY MASTER JAMES: Okay.  
5 have a present for Ms. Kraft.  
6 MS. KRAFT: Thank you.  
7 MR. BREWER: If I could make one point.  
8 SPECIAL DISCOVERY MASTER JAMES: I was  
9 distracted, I'm sorry, by that intrusion.  
10 Can you just restate everything you just  
11 said?  
12 MR. BREWER: Okay. I better find the  
13 right --  
14 SPECIAL DISCOVERY MASTER JAMES: Yes.  
15 Point me to your papers.  
16 MR. BREWER: Let me find the right  
17 exhibit.  
18 MS. STEINGART: It's an exhibit to our  
19 reply.  
20 MR. BREWER: It's Exhibit 43 to the  
21 supplemental Brewer declaration which was in our reply  
22 papers with the emergency motion.  
23 SPECIAL DISCOVERY MASTER JAMES: Okay.  
24 43?

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1 MR. BREWER: Yes. So this chart, which  
2 Ms. Steingart has pointed out is in unhelpfully small  
3 type, was trying to help show how some of these  
4 various issues overlap with respect to the documents  
5 that were subject to the return demands. And there's  
6 a column toward the right that says admittedly  
7 disclosed to SEC. And at some point early in April  
8 they gave us a list that corresponded to their log up  
9 to that date of what they disclosed to the SEC.  
10 So basically that column yes means it's on  
11 their list, they told us they gave it to the SEC,  
12 blank means apparently they did not disclose to the  
13 SEC and question mark means basically the information  
14 available to us was not sufficient to make that  
15 determination generally because there were an  
16 additional thirty-odd items that were the subject of  
17 clawback letters subsequent to the list they gave us  
18 of what they had given to the SEC, so we didn't have  
19 the ability to cross-reference.  
20 SPECIAL DISCOVERY MASTER JAMES: Okay.  
21 guess for purposes of this motion since it's all or  
22 none, I don't really need to know the answer to that,  
23 but I'm going to need -- I mean for the record let me  
24 turn to Mr. Pizzurro just for a minute and I'll come

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1 back to you.  
2 MS. STEINGART: Sure.  
3 SPECIAL DISCOVERY MASTER JAMES: Do you  
4 know the answer to whether these other documents were  
5 given to the SEC or not?  
6 MR. PIZZURRO: I don't know the answer to  
7 that as sit here, no.  
8 SPECIAL DISCOVERY MASTER JAMES: Okay. Go  
9 ahead, Ms. Steingart.  
10 MS. STEINGART: All right.  
11 SPECIAL DISCOVERY MASTER JAMES: Is there  
12 anything else?  
13 MS. STEINGART: You know, I have to just  
14 regretfully make one sort of little side note here and  
15 this was something that I meant to discuss and you've  
16 reminded me of it when you asked me about the waiver  
17 under the privilege log and that is -- may I harken  
18 back to that for 30 seconds?  
19 SPECIAL DISCOVERY MASTER JAMES: Does this  
20 relate to the thing I already ruled on?  
21 MS. STEINGART: No. It's something that  
22 you have reserved --  
23 SPECIAL DISCOVERY MASTER JAMES: Okay.  
24 Sure.

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1 MS. STEINGART: -- on the privilege log.  
2 That one of the inadequacies in their privilege log  
3 and one of the reasons, an additional reason that  
4 there should be a waiver there is before the privilege  
5 log was delivered to us we reminded North Western that  
6 they should disclose which documents on that log had  
7 been provided to the SEC. When we first received the  
8 privilege log, there was no such designation. And it  
9 took additional correspondence and additional  
10 persuasion before North Western was willing to do that  
11 even though a privilege log would require anyone to  
12 show each of the parties, the preparing party, excuse  
13 me, to show each person or entity to which the  
14 privileged document had been provided.  
15 SPECIAL DISCOVERY MASTER JAMES: So you're  
16 saying that in addition to the reasons you've already  
17 stated for waiver because of lateness, also the log  
18 was inadequate and, therefore, privilege could be  
19 waived on that basis?  
20 MS. STEINGART: Right. And there can be  
21 no inadvertence claimed with respect to that. That's  
22 something that was discussed, was an issue here before  
23 the Court, was something that we sent a letter on  
24 before the privilege log was delivered and the



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1 privilege log was devoid of any reference, nor even a  
2 commitment to provide such or a request that we would  
3 agree to a delay because they would provide such,  
4 again which could have been made either before or  
5 after the fact.

6 Back to choice of law. So I think that  
7 where we are on choice of law is that the restatement,  
8 the way the restatement would analyze the question and  
9 the way that each of the courts would, we're at  
10 Montana law and the amendments to 502 have not, have  
11 not been adopted and have, in fact, been set aside. I  
12 don't want to say rejected because who knows when  
13 people may look at them again?

14 So a federal court would be constrained at  
15 this point to in this setting reject selective waiver.

16 SPECIAL DISCOVERY MASTER JAMES: Now,  
17 remind me. I believe that I ordered production of SEC  
18 documents, did I not?

19 MS. STEINGART: Yes.

20 SPECIAL DISCOVERY MASTER JAMES: And am I  
21 correct that NorthWestern has produced some SEC  
22 documents?

23 MS. STEINGART: Yes. Yes, they have. And  
24 within the categories, you know, our request was

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1 briefly address the aside that Ms. Steingart just  
2 mentioned on the privilege log.

3 As we pointed out in our papers, this  
4 issue as to whether or not documents would be  
5 produced, otherwise privileged documents would be  
6 produced because they were produced to the SEC, it was  
7 teed up between the parties in December in  
8 correspondence between Ms. Steingart and myself. It  
9 was presented again in front of Your Honor at the  
10 January 29 hearing and it was the subject of that  
11 letter.

12 And as Your Honor just pointed out, there  
13 is absolutely no need to know what documents are on  
14 the privilege log that were produced to the SEC in  
15 order to get a ruling on this issue. This is a motion  
16 that could have been, probably should have been made  
17 months ago, so there is no issue here about a waiver  
18 based on a deficient privilege log. And they can't  
19 claim -- and this is another point on the overall  
20 waiver of privilege log, slash privilege log issue.  
21 There's no prejudice to Magten. There's no prejudice  
22 on this issue. There's no prejudice on the other  
23 issue.

24 So all of that, those are significant

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1 narrowed and within the categories that the Court  
2 ordered production, we have production, except for the  
3 items that are listed. In the production that  
4 NorthWestern made to the SEC, they produced both  
5 privileged and non-privileged documents. So to the  
6 extent that they provided, that those things fell into  
7 the items that you ordered, they provided us with the  
8 non-privileged documents and as to the privileged  
9 documents they provided to the SEC they maintain that  
10 the privilege remains intact.

11 So, yes, we do have production of the  
12 non-privileged materials.

13 MR. BREWER: And there's the Rule 408  
14 stuff.

15 SPECIAL DISCOVERY MASTER JAMES: That's  
16 part of another argument, or is that part of this?

17 MR. BREWER: There's the Rule 408 stuff.

18 MS. STEINGART: Right. The Rule 408 is  
19 part of item 5, I think.

20 SPECIAL DISCOVERY MASTER JAMES: Right.

21 MR. BREWER: Okay.

22 SPECIAL DISCOVERY MASTER JAMES: Okay.

23 Mr. Pizzurro.

24 MR. PIZZURRO: All right. Let me first

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1 factors that the Court would have to take into account  
2 in trying to determine whether there was any waiver  
3 because of the delay in the privilege log. But having  
4 spoken to that, let me address the choice of law issue  
5 in this entire matter.

6 I think where we are -- and I'm sure I'll  
7 be reminded if we're not by Ms. Steingart -- is an  
8 agreement that Westinghouse is not the controlling  
9 rule of decision in this case. It simply is not. It  
10 represents a majority view in Magten's view, but it is  
11 not binding on Judge Farnan or Your Honor. And so the  
12 issue here is what is the appropriate rule of  
13 decision? Right? So we know it's not Westinghouse.  
14 What is the rule?

15 The Third Circuit has said that the  
16 federal court in assessing whether or not a privilege  
17 applies under Rule 501 of the Federal Rules of  
18 Evidence where it is sitting in diversity or it is  
19 assessing a state law claim has to apply state law to  
20 determine the privilege. And in the first instance  
21 what that court then must do is apply the forum  
22 state's choice of law principles and the choice of law  
23 principles are designed not to determine what law  
24 applies to the underlying claim. That's irrelevant.

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1 That's irrelevant under the restatement. It's  
2 irrelevant under the Delaware formulation. Which is  
3 different from the restatement, and that's an  
4 important point.

5 What the Court's choice of law analysis  
6 must do is determine what is the jurisdiction with the  
7 most significant interest in the privilege issue, not  
8 the underlying fraudulent conveyance issue. That's  
9 completely, completely irrelevant. Even under the  
10 restatement analysis what the Court is to look to is  
11 where were the communications made? Where were the  
12 disclosures made? It has nothing to do with the  
13 underlying cause of action.

14 So when we look at --

15 SPECIAL DISCOVERY MASTER JAMES: Can I  
16 interrupt?

17 MR. PIZZURRO: Certainly.

18 SPECIAL DISCOVERY MASTER JAMES: Where is  
19 that discussed in your brief?

20 MR. PIZZURRO: What we discussed, the  
21 whole choice of law analysis is at pages 8 through 10  
22 and then we go to the substantive law of Delaware.

23 But the distinction here --

24 SPECIAL DISCOVERY MASTER JAMES: Where?

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1 determine what state's law applies to the privilege.  
2 And in the case law, the Delaware case law and the  
3 analysis that the Delaware courts do, the analysis has  
4 nothing to do with what is the law to be applied to  
5 the underlying cause of action. The entire analysis  
6 by all of these cases is what is the law to be applied  
7 to the privilege issue?

8 And when they do the analysis of the  
9 jurisdiction that has the most significant  
10 relationship, they are talking about the privilege.  
11 And you'll see in these cases that there is in many  
12 cases little, if any, connection to the State of  
13 Delaware other than the fact that Delaware happens to  
14 be the forum and yet the courts routinely and almost  
15 uniformly in Delaware apply Delaware law to the issue  
16 because the focus of this choice of law analysis is  
17 not what law applies to the underlying substantive  
18 claim. It's what jurisdiction has the most  
19 significant interest in seeing the privilege applied.

20 And the Delaware courts in cases that have  
21 almost nothing to do with the State of Delaware,  
22 including In Re: Best Lock which involved Indiana,  
23 including I think it's -- I'm not as familiar with the  
24 facts in the Lee v. Engle case. But what those cases

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1 MR. PIZZURRO: If I may, the issue that I  
2 just particularized, which is to draw a distinction  
3 between the choice of law with respect to the  
4 underlying claim and the choice of law with respect to  
5 the privilege, I think it's very clear from what we  
6 put here, but the argument was never made that Montana  
7 law or South Dakota law or some law should apply  
8 because of the choice of law analysis with respect to  
9 the underlying claim until there was a reply brief to  
10 this.

11 So the first opportunity that we have to  
12 make this clear is in this argument and that's what I  
13 am making clear.

14 SPECIAL DISCOVERY MASTER JAMES: So none  
15 of the cases that you have cited in your answering  
16 brief are responsive to this because of your position  
17 that this was raised for the first time in the reply?

18 MR. PIZZURRO: No. I think these cases do  
19 answer the question. What I am saying is it's not  
20 explicated the way that I am doing it in the argument.

21 What those cases I believe stand for is  
22 that in a circumstance such as this where state law  
23 governs the underlying claim, state law governs, not  
24 federal law governs the privilege. Now you have to

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1 do is say look, what we're going to do is we're going  
2 to examine what is the interest with respect to the  
3 privilege, and these cases come down on the  
4 application of Delaware law.

5 So if you apply, which the Court must --  
6 first of all, the restatement analysis is different  
7 from the Delaware analysis and there can't be any  
8 argument that the forum's choice of law principles are  
9 what govern so we don't look at the restatement,  
10 although I will circle back to it in a moment.  
11 Delaware's analysis, which we do set forth here, has  
12 led the Delaware courts in circumstances very similar  
13 to this to apply Delaware law on the issue of the  
14 privilege and, indeed, it has been argued by some that  
15 this is a procedural issue in any event and,  
16 therefore, the law of the forum should apply.

17 But let's look at the alternative analysis  
18 for a moment because it doesn't get them anywhere.  
19 What we have heard and what we know from our own  
20 research is there really isn't any rule of decision on  
21 this decision in Montana or South Dakota. The choice  
22 of law rule is not that if there is a default, rather  
23 is not that if you can't find what the applicable law  
24 is in the jurisdiction that your choice of law

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1 analysis would normally point you to that you adopt  
2 some majority rule. The default is always the state  
3 of the forum. It's the forum's law.  
4 If a party is saying that the law of  
5 Montana applies and there is no Montana law, you don't  
6 go to Westinghouse. You don't go to the District  
7 Court of the District of Columbia. You don't go to  
8 some commentator's view of what the majority rule is.  
9 There's only one default, and that's the forum and  
10 that's the case with respect to every choice of law  
11 analysis.

12 So it doesn't do you any good to say that  
13 Montana we think would follow the majority rule.  
14 There is no Montana rule, so the rule has to be  
15 Delaware.

16 And, finally, let me come back to the  
17 restatement analysis because the restatement says, and  
18 very clearly, even if you were to conduct this  
19 alternative analysis which has to do with issues such  
20 as where the communications were made, et cetera, that  
21 analysis is always trumped by a public policy  
22 consideration of the forum. And we believe here that  
23 Delaware's public policy as evidenced by the decision  
24 in Saito has got to be for selective waiver. And if

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1 the only reason for that is that Delaware has adopted  
2 that stance in the face of the Westinghouse decision  
3 and other decisions I think demonstrates that the  
4 Courts in this state believe that that is an extremely  
5 important, fundamental public policy of the state and  
6 I think that in reading the Saito decision and the  
7 reasons why Delaware has adopted a selective waiver  
8 analysis and has rejected the Westinghouse position  
9 and others is because of the very strong policy  
10 Delaware places on encouraging parties to cooperate  
11 with regulators and not be worried about a waiver of  
12 otherwise privileged documents.

13 So I think whether you do the analysis,  
14 which is the appropriate one, applying Delaware choice  
15 of law principles to determine the state that has the  
16 most fundamental issue, fundamental relationship or  
17 interest in the issue, which is the privilege, that  
18 leads you to Delaware law.

19 If you have some alternative analysis that  
20 would lead you to look at Montana, since there is no  
21 rule in Montana or South Dakota, default under a  
22 choice of law principles guide you to the law of the  
23 forum and under the restatement analysis, because of  
24 the fundamental public policy that Delaware has

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1 evidenced in adopting the selective waiver rule, it  
2 leads you back to Delaware.

3 And, finally, there is the view that in  
4 and all events this is a procedural issue which is  
5 always governed by the law of the forum and that's  
6 Delaware. So I think that it's clear here that the  
7 production of the documents under a confidentiality  
8 order with the SEC, and we put this all in the brief,  
9 under the extraordinary precautions that NorthWestern  
10 took and in accordance with the policy that has been  
11 the consistent policy of the SEC itself and with what  
12 is being considered as adoption as a uniform rule in  
13 these circumstances, it's got to be clear that the  
14 selective waiver rule of the Saito decision governs.

15 SPECIAL DISCOVERY MASTER JAMES: With  
16 respect to the documents that were disclosed to the  
17 SEC that you claim be privileged even under selective  
18 waiver, were all of them -- and you may not know the  
19 answer as you sit here. Were they all attorney-client  
20 or were some of them work product? Was it a  
21 combination?

22 MS. DELANEY: A combination.

23 MR. PIZZURRO: I believe it was a  
24 combination. There's no, there's no privilege which

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1 is being asserted other than attorney-client, work  
2 product or a combination of the two with respect to  
3 these documents.

4 SPECIAL DISCOVERY MASTER JAMES: All  
5 right. Now, in the Saito decision Chancellor Chandler  
6 predicated his ruling in that case to some extent on  
7 the fact that every single document at issue that had  
8 been disclosed to the SEC in that case was work  
9 product and, therefore, under his analysis the SEC --  
10 I can't remember whether there was a confidentiality  
11 order in that case or not. But his view was that in  
12 terms of waiving the privilege, obviously a different  
13 rule applies to work product than to attorney-client.

14 And with respect to work product, it is  
15 the likelihood that the work product is going to fall  
16 in the hands of your adversary. And he held in that  
17 case that because probably there was a confidentiality  
18 agreement that the documents given to the SEC would  
19 not likely fall into the hands of an adversary.

20 Now, that logic doesn't work if the  
21 privilege you're asserting, even under Saito, is only  
22 the attorney-client privilege.

23 So I want your comment on Saito as applied  
24 to attorney-client as opposed to work product.



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1 MR. PIZZURRO: Well, first of all, I'm not  
2 sure that I would agree with the premise that the  
3 rationale does not apply to attorney-client  
4 communications, as well as work product because you  
5 similarly have an interest in maintaining the  
6 confidentiality of attorney-client privileged  
7 communications from your adversary as well as from, as  
8 well as from anyone else.

9 SPECIAL DISCOVERY MASTER JAMES: Well, but  
10 the rule in Delaware at least, and you're seeking to  
11 apply Delaware law here, is very clear that to the  
12 extent you intentionally disclose an attorney-client  
13 document as opposed to a work product document that  
14 you have waived the privilege unless, as you seem to  
15 argue in your papers, there's a common interest  
16 between the party to whom it's disclosed and the  
17 client. And I want to get back to that in a minute.

18 So I'm a little -- and maybe you're not in  
19 a position to discuss this because maybe you need to  
20 look at Saito again and, if that's the case, just tell  
21 me. But that seems to be a critical distinction in  
22 Chancellor Chandler's mind and that may be a limiting  
23 factor on how I decide this issue if I agree with you  
24 that Delaware law should apply as opposed to some

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1 afraid, having taken all of the precautions they can  
2 possibly take, that there would be some waiver found  
3 with respect to privileged communications as to third  
4 parties.

5 So I think that there isn't anything that  
6 I'm aware of -- again, I'll be happy and welcome the  
7 opportunity to look at the case again even more  
8 carefully. But I don't think there's anything in the  
9 Saito decision that suggests that the Chancellor was  
10 saying that the attorney-client privilege would not be  
11 or would be waived under the circumstances. He was  
12 dealing with work product. And I recognize even  
13 Westinghouse has certain distinctions that it makes  
14 between attorney-client and work product, but I don't  
15 think that they are distinctions here that one would  
16 be able to find under Saito or Delaware law.

17 SPECIAL DISCOVERY MASTER JAMES: All  
18 right. Let's turn to common interest for a minute,  
19 which Ms. Steingart didn't address but I'm sure she  
20 will when she replies.

21 I find it a little hard but perhaps you  
22 can persuade me how under these circumstances a  
23 company that's being slammed with all kinds of  
24 sanctions by the SEC could be viewed as a party with

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1 other state.

2 MR. PIZZURRO: Well, I would always  
3 welcome the opportunity to reexamine the case and to  
4 maybe deal with a distinction here, but I believe that  
5 the real issue, certainly in the attorney-client  
6 privilege area in the case law in Delaware and  
7 elsewhere, centers on whether the party has a  
8 reasonable expectation of maintaining the  
9 confidentiality of the communication and has taken the  
10 appropriate steps to ensure that that is going to be  
11 maintained.

12 And in this case that is without a doubt  
13 the fact. There was a confidentiality agreement that  
14 was entered into with the SEC. There were, as we  
15 pointed out, there were even additional protections  
16 that were sought in terms of possible FOIA disclosures  
17 through public inquiry and you have to I think, I  
18 think that has to be whetted, if you will, with the  
19 public policy which I think is something that the  
20 Chancellor had in mind in the Saito decision of  
21 encouraging cooperation with regulators and not  
22 putting the companies or others in a position where  
23 they are going to be less than forthcoming in  
24 cooperating with law enforcement because they're

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1 whom NorthWestern shares a common interest.

2 MR. PIZZURRO: You mean the SEC and  
3 NorthWestern?

4 SPECIAL DISCOVERY MASTER JAMES: Yes.

5 MR. PIZZURRO: Well, I think that actually  
6 the outcome of the investigation and the cooperation  
7 that NorthWestern provided answers that question very  
8 clearly. NorthWestern immediately when the  
9 investigation -- first of all, NorthWestern I believe,  
10 and I'm pretty sure of this, instituted some of its,  
11 certainly the internal investigation of Mr. Hylland  
12 prior to the time that the SEC investigation was  
13 commenced. So when issues regarding what had happened  
14 in 2002 with respect to the financials at the company  
15 came to light, the company itself began to take steps  
16 to determine what had happened and who was  
17 responsible. And when the SEC began its  
18 investigation, the company cooperated entirely with  
19 the SEC.

20 And ultimately if one looks at the cease  
21 and desist order, which is public, all these documents  
22 are public now, the cease and desist order with  
23 respect to NorthWestern, they didn't get slammed with  
24 any sanctions. They didn't get slammed with sanctions

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1 at all. They have an injunction not to violate the  
2 securities laws in the future and the violations which  
3 were found in the cease and desist order have nothing  
4 to do with any fraud or other wrongdoing. It has to  
5 do with really ministerial reporting requirements  
6 under certain provisions of the securities laws.

7 The people who did get more substantive  
8 sanctions who settled with the SEC were certain  
9 corporate officials, certain corporate officials with  
10 respect to whom the company was cooperating with the  
11 SEC to determine who's responsible for this; let's get  
12 to the bottom of this. So there was clearly a common  
13 interest and as a result of that common interest in  
14 the cooperation that the company provided, the company  
15 was effectively exonerated and the individuals who  
16 were responsible ended up having to settle and pay  
17 some substantial fines.

18 SPECIAL DISCOVERY MASTER JAMES: And stay  
19 out of the business?

20 MR. PIZZURRO: And they were barred I  
21 think for five years from being directors of public  
22 companies.

23 SPECIAL DISCOVERY MASTER JAMES: Where  
24 does the SEC investigation stand now? Is the

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1 direction of this -- and "investigation" may be the  
2 wrong word. I'm sure it's described in here and I've  
3 just forgotten in the wealth of papers.

4 Are they pursuing the individuals only now  
5 and the corporation is out of the picture? Explain  
6 the procedural status to me.

7 MR. PIZZURRO: My understanding -- and I  
8 don't represent the company, I've made this caveat  
9 before, I do not represent the company in the SEC  
10 proceedings. So I'm giving you my best understanding,  
11 is that there is no further action contemplated or  
12 investigation of the company. There are continuing  
13 investigations I think of some individuals. There's  
14 some additional individuals who have not yet settled  
15 with the SEC who have received Wells notices.

16 What the status of those investigations  
17 are, I have no idea and I don't know if anybody has  
18 any idea other than counsel and the individuals  
19 involved, counsel for those individuals rather and  
20 those individuals.

21 SPECIAL DISCOVERY MASTER JAMES: Can  
22 counsel for Mr. Kindt and Mr. Hanson tell me whether  
23 any SEC investigation is being conducted as to your  
24 clients?

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1 MR. KALECZYC: There is none.

2 SPECIAL DISCOVERY MASTER JAMES: Thank  
3 you.

4 Anything else?

5 MR. PIZZURRO: No, unless you have a  
6 question.

7 MS. STEINGART: Let's start out with  
8 choice of law in general. Okay? There is not one  
9 case where a different state law was applied to  
10 determine a privilege and a substantive decision in a  
11 case. In each of the cases that Mr. Pizzurro refers  
12 to, they were Delaware law cases. Each of the cases  
13 in this section were sections where the Court was  
14 adjudicating whether documents had to be turned over  
15 under the corporate document section of Delaware law.

16 SPECIAL DISCOVERY MASTER JAMES: Section  
17 220.

18 MS. STEINGART: Yes. But none was a case  
19 where they said do you know what? This is a case  
20 where New Jersey law applies, but because of some  
21 overarching concern we have we're going to let New  
22 Jersey law decide if there was wrongdoing here, but  
23 we're going to let Delaware law decide if there was a  
24 privilege. That has never happened.

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1 SPECIAL DISCOVERY MASTER JAMES: Well, I'm  
2 afraid I'm going to have to disagree with you there.  
3 I mean, at least NorthWestern knows that I know a  
4 little bit about this because I wrote a book on  
5 privilege on Delaware law. And there is not a single  
6 case up to at least the time of this edition of the  
7 book which held that privilege is not decided on a  
8 state law other than Delaware. Every single state  
9 case up to the time of the publication of this book  
10 decided the privilege issue as a procedural matter on  
11 Delaware law even though it involved substantive law  
12 on other things in other jurisdictions that had no  
13 connection whatsoever to Delaware.

14 Now, the cases that they may have cited  
15 all may have been corporate cases and obviously there  
16 the Delaware nexus and corporate governance cases  
17 would apply. So there's no analysis in your briefing  
18 that addresses the point that has been raised here by  
19 Mr. Pizzurro that the fact is that you don't look at  
20 the restatement. You look at what Delaware does.

21 And if you can cite a case to me where  
22 Delaware has applied the state's law governing the  
23 substantive merits of the case to privilege as opposed  
24 to Delaware law, I would love to see it.

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1 MS. STEINGART: Well, certainly in  
2 Westinghouse, Westinghouse is a Delaware company and  
3 to the question of privilege the Court applied New  
4 Jersey law.

5 SPECIAL DISCOVERY MASTER JAMES: Based on  
6 a New Jersey District Court decision.

7 MS. STEINGART: Right. And certainly the  
8 decision, the decisions in Delaware on selective  
9 waiver, which goes to a different aspect of this, are  
10 lower court decisions and not decisions that this  
11 Court is bound to follow. It's not a decision of the  
12 Delaware Supreme Court; only a decision of the  
13 Chancery Court.

14 So on two different bases I think that  
15 under circumstances such as these, a federal court  
16 operating under 502 would --

17 SPECIAL DISCOVERY MASTER JAMES: You mean  
18 501.

19 MS. STEINGART: 501. I'm sorry. Would  
20 apply the law, the privilege law, the substantive  
21 privilege law. It said where the state law provides  
22 the rule of decision, the state law should govern the  
23 privilege.

24 SPECIAL DISCOVERY MASTER JAMES: Yes.

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1 MS. STEINGART: That's what 501 says. So  
2 from that point of view, I don't think that you will  
3 find situations where they are applying that rule,  
4 applying 501, a different privilege law and a  
5 substantive law. And when I say that that never  
6 happens, really I am referring to 501. It doesn't  
7 happen. And it would be in a sense contrary to 501.

8 SPECIAL DISCOVERY MASTER JAMES: Now, one  
9 of the cases that I think you did cite was the  
10 Remington Arms case. Maybe not. But that is a  
11 decision by then Judge Latham in which he held, he  
12 did apply the privilege law of Connecticut in a  
13 diversity action which was the substantive law  
14 governing the merits of the case, so that is a  
15 decision that would support your position.

16 I don't know whether you cited that or  
17 not.

18 MS. STEINGART: I don't know if I cited it  
19 here, I'm sorry to say. I wish I had.

20 SPECIAL DISCOVERY MASTER JAMES: But I  
21 have to resolve -- I mean, whether that was correctly  
22 decided or not is an issue I guess that isn't before  
23 me.

24 But let's hear your commentary on Saito

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1 and its application to attorney-client as opposed to  
2 work product.

3 MS. STEINGART: Well, there are two areas  
4 where Saito I think differs, if Saito is applicable,  
5 which I don't think it is for any number of reasons.

6 SPECIAL DISCOVERY MASTER JAMES: Right.

7 MS. STEINGART: There are two areas where  
8 Saito differs from the gloss that NorthWestern places  
9 on it. One is as to attorney-client. It does not  
10 deal in the same way with attorney-client as it does  
11 with work product. And I think that there are good  
12 reasons for distinguishing between the two.

13 I think that attorney-client is really  
14 based on secrecy and once that secrecy is no longer  
15 there, once it's used as a sword, it can no longer be  
16 used as a shield.

17 And I don't think that the analysis with  
18 respect to selective waiver on work product really  
19 diminishes the force of that truism with respect to  
20 attorney-client. That has always been an important  
21 factor in determining whether the limitation that is  
22 imposed by attorney-client should be applied in any  
23 situation that you can only use it as a shield, that  
24 you can't use it as a sword and then turn around.

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1 The other instance where Saito is at odds  
2 with the argument now made by NorthWestern is on  
3 common interest. Saito specifically in words of one  
4 syllable says that we do not, we can't find that  
5 there's not a waiver here because of common interest  
6 because of course there's no common interest. So from  
7 that point of view, I don't think that's an argument  
8 that supports what Mr. Pizzurro says.

9 The company was not exonerated. The  
10 company went through bankruptcy and there were  
11 different people there and it was a different time,  
12 but there's no exoneration. And the fact that the  
13 company could have engaged in such systematic and  
14 widespread wrongdoing at a time that it was entering  
15 into transactions, where it was issuing equity, where  
16 it was reissuing \$720 million, exchanging notes worth  
17 \$720 million and transferring \$1.5 billion in assets  
18 and be systematically intentionally using false  
19 financials and to have somebody say the company is  
20 exonerated when the four highest-ranking officers and  
21 many others are now under investigation is just, is  
22 just unacceptable. It's the trivialization of  
23 something that is not trivial. There may be defenses  
24 and technical issues that people are raising, but I



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1 don't think that we can in good faith sort of sit here  
 2 and say the company was exonerated.  
 3 And that's a significant issue here  
 4 because it goes to the heart of what courts talk about  
 5 when they talk about selective waiver. Companies  
 6 should begin to throw themselves on the sword when  
 7 this kind of massive wrongdoing is uncovered. It's  
 8 not a wrong thing for companies to seek to cooperate  
 9 with the government, but also companies should have to  
 10 face up to the injuries and to the damage that is  
 11 necessarily and intentionally caused by the same acts  
 12 for which they seek forgiveness.

13 I think that the Qwest decision in 2006  
 14 goes specifically point by point as to why Saito's  
 15 analysis of only cooperation will lead companies to  
 16 provide, you know, only finding selective privilege  
 17 would lead companies to provide cooperation with the  
 18 SEC, that is an utterly flawed kind of reasoning.  
 19 Companies want to cooperate because they want to  
 20 manage and deal with their exposure. Well, part of  
 21 their exposure is not only to the government; it's to  
 22 the people that they have intentionally hurt.

23 So I think that there is a very strong  
 24 public policy that to the extent that this material

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1 there have to be certain general principles like you  
 2 waive something if you give it to a third party. I  
 3 mean, we don't have -- obviously Montana may not have  
 4 addressed this particular issue, but I'm sure Montana  
 5 is not a tabula rasa and neither is South Dakota as to  
 6 basic issues of privilege.

7 So I want each side to submit  
 8 simultaneously to me a supplemental memo of five pages  
 9 that discusses the basic principles of privilege law  
 10 of those two states and how they would or would not  
 11 apply to the instant question of waiver as to  
 12 disclosing the materials to the SEC.

13 Is there any reason this can't be done by  
 14 next Friday?

15 MR. PIZZURRO: No reason.

16 MS. DELANEY: No.

17 SPECIAL DISCOVERY MASTER JAMES: I'm  
 18 waiting for --

19 MS. STEINGART: No.

20 SPECIAL DISCOVERY MASTER JAMES: Next  
 21 Friday is okay?

22 MS. STEINGART: That's fine. Right.

23 That's fine.

24 SPECIAL DISCOVERY MASTER JAMES: Is five

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1 has been used to bargain for and obtain leniency and  
 2 to throw various other people under the bus who should  
 3 have been thrown under the bus because they were, they  
 4 were the CEO, the CFO, the COO who led the company  
 5 into wrongdoing, well, there's a good reason why  
 6 companies should seek cooperation. They shouldn't be  
 7 able to use those same things to shield themselves  
 8 from answering to the harm that they have caused.

9 So I think that here that a district court  
 10 applying 501 would not and district courts have not  
 11 found that there should be different rules that govern  
 12 procedure and govern substantive law and that even if  
 13 we were going to look at Delaware law, I think Saito  
 14 is a lower court decision and I don't think that it's  
 15 binding.

16 SPECIAL DISCOVERY MASTER JAMES: Okay  
 17 Thank you.

18 I'm going to take this part of the motion  
 19 under advisement. However, I'm going to ask the  
 20 parties to supplement the record and I'll discuss with  
 21 you the timing on this. But to the extent I'm being  
 22 asked to apply Montana or South Dakota law, it's not  
 23 enough for me for people to say well, there's nothing  
 24 to tell me about Montana or South Dakota law because

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1 pages enough?

2 MR. BREWER: Yes.

3 MS. STEINGART: If we could have between  
 4 five and ten.

5 What do you think?

6 MR. BREWER: When you say --

7 MR. PIZZURRO: I don't know. If you give  
 8 us three weeks, we could probably do it in three  
 9 pages.

10 MR. BREWER: I guess the question is do  
 11 you mean a five-page letter brief which is single  
 12 spaced or a five-page brief with a caption which is  
 13 double spaced?

14 SPECIAL DISCOVERY MASTER JAMES: I don't  
 15 want anything single spaced.

16 MS. STEINGART: I don't want anything  
 17 single spaced, John. I've already explained that  
 18 nothing should ever be single spaced.

19 SPECIAL DISCOVERY MASTER JAMES: Don't  
 20 ever mention that to a judge either.

21 MR. BREWER: Okay.

22 MS. STEINGART: Can we ask for between  
 23 five and ten?

24 SPECIAL DISCOVERY MASTER JAMES: Let's say

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1 seven pages.  
 2 MS. STEINGART: Okay.  
 3 MR. BREWER: Okay.  
 4 SPECIAL DISCOVERY MASTER JAMES: And I'm  
 5 expecting one submission for all the defendants and  
 6 one submission from Magten and Law Debenture. All  
 7 right.  
 8 MS. STEINGART: If I could also just point  
 9 out the advisory notes to the rule --  
 10 SPECIAL DISCOVERY MASTER JAMES: Which  
 11 rule?  
 12 MS. STEINGART: To 501, which is on page  
 13 409, say that on the other hand, the federal courts  
 14 are bound to apply the state's privilege law in  
 15 actions founded upon a state-created right or defense  
 16 and that would remove the forum shopping incentive.  
 17 SPECIAL DISCOVERY MASTER JAMES: Okay.  
 18 It's now 12:41. I mean, I found this all very helpful  
 19 and I don't think we have wasted any time, but we're  
 20 clearly not going to finish before lunch.  
 21 So my suggestion is that we take an hour  
 22 break for lunch or maybe 45 minutes and come back at  
 23 1:30 and resume discussion of the issues that remain.  
 24 Is that acceptable with everyone? Because

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1 right. So we will resume at 1:30.  
 2 (Recessed for lunch at 12:43 p.m.)  
 3 -----  
 4 AFTERNOON SESSION  
 5 1:30 p.m.  
 6 SPECIAL DISCOVERY MASTER JAMES: We're  
 7 back on the record. The next issue we're going to be  
 8 addressing is paragraph number 5 of my May 17 letter  
 9 which states with respect to the plaintiffs' motion  
 10 referenced in paragraph 1 above whether certain other  
 11 documents that are subject to plaintiffs' discovery  
 12 requests are privileged or whether the privilege has  
 13 been waived.  
 14 Again, that is plaintiffs' motion and,  
 15 Ms. Steingart.  
 16 MS. STEINGART: Thank you.  
 17 Initially, we provided a letter to  
 18 NorthWest and I think that we provided the first, the  
 19 first of those letters at the beginning of April that  
 20 indicated that when we had scrubbed or gone through  
 21 the privilege log and we looked at the information on  
 22 the log concerning what the document was and who  
 23 created it and who received copies of it that it  
 24 appeared to us that either it was all non-lawyers or

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1 I want to get this done today and I think everyone  
 2 else does too. There's a cafeteria downstairs.  
 3 There's a cafeteria across the street in Dale's  
 4 building and, Victoria, you're in that building.  
 5 Right?  
 6 MS. COUNIHAN: Actually, Nemours.  
 7 SPECIAL DISCOVERY MASTER JAMES: Nemours.  
 8 Okay.  
 9 MS. STEINGART: I was just going to ask if  
 10 I can make a request.  
 11 SPECIAL DISCOVERY MASTER JAMES: Sure.  
 12 MS. STEINGART: My colleague, Mr. Kaplan,  
 13 will be dealing with the issue of number 9 and I would  
 14 like Mr. Kaplan to be able to get home before a  
 15 certain point in the day for certain observances and I  
 16 was going to ask if we could do that when we return  
 17 from lunch so that he could have an opportunity to  
 18 leave in a timely way.  
 19 SPECIAL DISCOVERY MASTER JAMES: Sure.  
 20 MS. STEINGART: If that's okay with  
 21 everybody?  
 22 MR. PIZZURRO: No problem. No problem at  
 23 all.  
 24 SPECIAL DISCOVERY MASTER JAMES: All

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1 there were people who were not within the privilege,  
 2 third parties that were included.  
 3 Also, we have some concern about whether  
 4 there are certain documents that went to government  
 5 agencies that still is not included on the log, but  
 6 I'm assuming that will be updated to show what  
 7 government agencies --  
 8 SPECIAL DISCOVERY MASTER JAMES: Other  
 9 than the SEC?  
 10 MS. STEINGART: Yes.  
 11 MS. DELANEY: I don't recall any --  
 12 MS. STEINGART: Well, there may have been  
 13 government agencies other than the SEC, but that's not  
 14 noted on the log. There are certainly a tranche of  
 15 the documents that we're going to hear about whether  
 16 they went to the SEC, that last privilege log.  
 17 SPECIAL DISCOVERY MASTER JAMES: Well, I  
 18 would expect that any privilege log they have should  
 19 indicate on it who received copies, whether it's the  
 20 SEC or any government agency. If that's not clear, it  
 21 should be clear.  
 22 MR. PIZZURRO: I'm not aware that there is  
 23 any other government agency, but I will double-check  
 24 that.

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1 MS. STEINGART: Right. I think that there  
2 may be Montana Public Service Commission may have  
3 gotten some or DOJ may have gotten some as well. We  
4 sent a letter and because of the other disputes that  
5 were percolating, NorthWest took the position that  
6 they didn't have to respond to the questions we raised  
7 about these documents.

8 In the reply brief on April 27th that was  
9 filed, NorthWestern was still maintaining the  
10 confidentiality of these documents and in a letter  
11 that was addressed to you NorthWestern changed its  
12 position on 211 of those documents.

13 SPECIAL DISCOVERY MASTER JAMES: Is this a  
14 letter that just came out --

15 MS. STEINGART: On May 16th.

16 SPECIAL DISCOVERY MASTER JAMES: --  
17 yesterday? Yes.

18 MS. STEINGART: Now, with respect to the  
19 others, the other forty-odd documents that are on our  
20 list, we don't know why they haven't withdrawn the  
21 privilege as to those because the third parties are  
22 apparent from the face. And we have prepared this  
23 little summary that shows the items we requested back,  
24 the notation about whether it was given to the SEC and

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1 agencies than the SEC that as yet has not been  
2 disclosed. At this point we don't have a rationale  
3 for why these third parties do not waive the  
4 privilege.

5 In addition, there is the issue which  
6 certainly revolves around the special report  
7 concerning Mr. Hylland. And during Mr. Hylland's  
8 deposition we learned that there was a separate  
9 independent reason for waiver of that privilege, and  
10 that is that at a time after Mr. Hylland had resigned  
11 from the company, the company provided him with a copy  
12 of the report. And from my understanding of Delaware  
13 law and the cases, even if Mr. Hylland was still a  
14 director of the company to the extent a special  
15 committee was formed and the interests of the special  
16 committee were adverse to his and he was informed of  
17 that process, the special committee and the board in  
18 deliberating on an issue to which his interest was  
19 adverse could exclude him from participation and  
20 certainly he would have no expectation that the  
21 privilege would apply to him.

22 For the first time we saw NorthWestern's  
23 response to that argument in the same letter in which  
24 we learned of the withdrawal of the privilege with

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1 also the notation about the persons on the log that  
2 signal to us that it was given to a third party.

3 We have indicated which ones are withdrawn  
4 and which ones in bold are still pending. We also  
5 prepared this supplement just to address the material  
6 that on the logs that they haven't had a chance to  
7 respond to but once the parameters are set I'm sure  
8 that those same parameters will be applied to the  
9 subsequent privilege logs that you provided us after  
10 the 23rd. So this goes to the privilege logs that you  
11 delivered on the 5th and 24th.

12 MR. PIZZURRO: Yes.

13 MS. STEINGART: Right. We had not given  
14 you a list of the documents listed on those that were  
15 third-party related.

16 MR. PIZZURRO: I see. I understand.

17 MS. STEINGART: So we're providing you  
18 with that just so whatever we determine here I assume  
19 that you will apply to those as well.

20 SPECIAL DISCOVERY MASTER JAMES: These are  
21 third parties other than the SEC?

22 MR. BREWER: Yes.

23 MS. STEINGART: Yes. These are third  
24 parties other than the SEC and if there were other

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1 respect to the 211 documents.

2 I think that as a practical matter that  
3 the reliance on Kirby v. Kirby as well as Moore  
4 Business Forms v. Cordant on the face of those cases  
5 is misplaced. There is no blanket rule that when  
6 someone is a director they always get attorney-client  
7 material that is prepared for the corporation during  
8 their tenure. That's only true if other facts do not  
9 exist that would make it inappropriate for the  
10 attorney-client privilege to apply.

11 Indeed, in the case of, in the case of SBC  
12 Interactive vs. Corporate Media Partners and other  
13 defendants, which is a Delaware Chancery Court 1997  
14 decision by Jacobs --

15 SPECIAL DISCOVERY MASTER JAMES: This was  
16 not discussed in your brief, or was it?

17 MS. STEINGART: No. Because I didn't see  
18 the cases until I got this letter yesterday.  
19 Chancellor Jacobs --

20 SPECIAL DISCOVERY MASTER JAMES: Vice  
21 Chancellor.

22 MS. STEINGART: -- distinguishes Moore and  
23 says that the entitlement of a director is subject to  
24 the facts and circumstances and that here in SBC there

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1 was a situation where there was a partnership that was  
 2 created and various of the partners were able to  
 3 designate people to go on the board. And the issue  
 4 became when there were considerations or evaluations  
 5 of whether the company should buy them out or continue  
 6 to have business with them whether they would be under  
 7 the umbrella of the privilege.

8 And the Court was very specific on page 4  
 9 of that opinion in dealing with the circumstances  
 10 where directors are often not entitled to information  
 11 that's being considered.

12 SPECIAL DISCOVERY MASTER JAMES: I must  
 13 have the wrong page. What's the actual star page?

14 MS. STEINGART: It's page 4 on top and the  
 15 star page is 12.

16 SPECIAL DISCOVERY MASTER JAMES: Thank  
 17 you.

18 MS. STEINGART: And the discussion really  
 19 begins there.

20 And here the Court is analyzing cases,  
 21 director cases and partnership cases together and the  
 22 Court indicates that the only way an attorney-client  
 23 relationship is arguable is if it's grounded in SBC's  
 24 contention that its status as a partner automatically

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1 because in Moore that director had a status as a  
 2 result of a contract and the other directors decided  
 3 to meet in special session without informing that  
 4 director that they were going to form a special  
 5 committee to consider buying out the interests of the  
 6 entity for whom that director was representing.

7 And in those circumstances where there was  
 8 a contractual right to be on the board and share in  
 9 the business information of the board and there was  
 10 this secret undertaking by others, the Moore court  
 11 said well, under these circumstances then the contract  
 12 required you to provide the material. But in other  
 13 circumstances, it cannot be the law that when five  
 14 directors decide that the sixth director has engaged  
 15 in systematic wrongdoing and form a special committee  
 16 to review that systematic wrongdoing and then report  
 17 to the rest of the committee, it cannot be that that  
 18 individual who's being accused would have access to  
 19 all the deliberations. And I think that the case law  
 20 more than supports it.

21 So as an independent, as a separate and  
 22 independent ground, other than provision to the SEC, I  
 23 think that this Hylland report has been distributed in  
 24 ways and at times that even Mr. Pizzurro at this point

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1 and as a matter of law conferred upon it the status of  
 2 a client.

3 And then goes on to talk about when you  
 4 look at the circumstances here the answer to that is  
 5 an emphatic no. And the circumstances there were  
 6 circumstances where the partner had interests that  
 7 were adverse to the other partners at that time.

8 If what, if the language in or the  
 9 statements in Mr. Pizzurro's letter are true, you  
 10 could never really have a corporation acting in  
 11 executive session when it had interests that were  
 12 either conflicting or adverse to one of its directors.  
 13 And we all know corporations do that all the time and  
 14 that the corporation is in a position where it can  
 15 receive attorney-client advice on the issues to which  
 16 it's adverse and it doesn't have to share that with a  
 17 director who has had to recuse himself, should have  
 18 recused himself or was asked by the other directors to  
 19 recuse himself.

20 And this case goes on on that page and on  
 21 page 13 to distinguish Moore. Moore was a case where  
 22 the director who was held to have a share of privilege  
 23 because of its status as a director was given  
 24 attorney-client privileged material and that is

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1 is unaware of. As we were sitting in the deposition,  
 2 Mr. Pizzurro was unaware that Mr. Hylland had been  
 3 provided with the report. There's no reason based on  
 4 Mr. Pizzurro's own experience that he should have  
 5 known that. The company was represented by others at  
 6 the time. The company was represented by others  
 7 during the bankruptcy.

8 However, one thing is clear, that very  
 9 often documents were designated as privileged where  
 10 there wasn't a thorough inquiry about where they had  
 11 gone or how they had been created or how they had been  
 12 used. I don't think, as I said before, as we sit here  
 13 today that Mr. Pizzurro can say with certainty how  
 14 much distribution Mr. Hylland's special committee  
 15 report had.

16 And it was reflected also in the  
 17 deposition of Mr. Fresia. There were documents  
 18 created by Mr. Fresia that were to -- that were not  
 19 addressed to, that were not from a lawyer that  
 20 contained a listing of facts --

21 SPECIAL DISCOVERY MASTER JAMES: Who is  
 22 Mr. Fresia?

23 MS. STEINGART: Mr. Fresia was the CFO of  
 24 Expanet. And during his deposition Mr. Fresia said



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1 those documents were never prepared for a lawyer or at  
2 the direction of a lawyer; that he did that on his own  
3 as he was thinking about the course of events at the  
4 company and becoming worried that blame would somehow  
5 be pointed at him or shifted at him and he wanted to  
6 make sure that he had written down his recollection.

7 SPECIAL DISCOVERY MASTER JAMES: Now, are  
8 these documents listed on what you've handed me?

9 MS. STEINGART: Yes. Well, these  
10 documents that we know went to third parties are  
11 listed. Mr. Hylland's, if we look at the face of the  
12 privilege log, Mr. Hylland's document wouldn't be here  
13 because on the face of it --

14 SPECIAL DISCOVERY MASTER JAMES: It  
15 doesn't show that he received it.

16 MS. STEINGART: It doesn't show.

17 SPECIAL DISCOVERY MASTER JAMES: The same  
18 with Mr. Fresia?

19 MS. STEINGART: In Mr. Fresia's on the  
20 face of it, it didn't show. So these are just the  
21 ones that we know because the privilege log indicates  
22 and while I'm sure that NorthWestern has made what  
23 they understand to be a good faith assessment of it, I  
24 think that we have learned enough in the course of the

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1 reply brief was being filed more or less  
2 simultaneously with the Hylland deposition going on so  
3 we did not have access to the transcript.

4 MS. STEINGART: Right. And the reason why  
5 we were able to ask Mr. Fresia about his document was  
6 because there were versions of it that weren't marked  
7 privileged and that weren't asked -- you know, none of  
8 them were marked privilege, but there were versions of  
9 it for which the return was not requested.

10 And the reason we were able to ask  
11 Mr. Hylland about his document was because there was a  
12 letter from the company to Mr. Hylland talking about  
13 their various differences and referencing the fact  
14 that they gave him a copy of it.

15 SPECIAL DISCOVERY MASTER JAMES: Where did  
16 you get that document?

17 MS. STEINGART: We got that, the letter  
18 from the company to Mr. Hylland was part of the  
19 production and was not a privileged document. It was  
20 not a document which the return was requested.

21 Also, there are references to the fact of  
22 the special committee report concerning Mr. Hylland in  
23 board minutes and other documents that haven't been.  
24 So we know of the existence of the report. We know of

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1 proceeding, a good faith assessment of which document  
2 should be included on the log, I think that we have  
3 learned in the course of these proceedings that  
4 documents that may seem to fall under this rubric may  
5 not.

6 So I think with respect to Hylland we  
7 certainly should have a finding that this is no longer  
8 a privileged document. We should have a finding that  
9 the attachments to it which are not privileged should  
10 be produced because there are a number of attachments  
11 that are not otherwise available in the production,  
12 e-mails and the like.

13 SPECIAL DISCOVERY MASTER JAMES: And you  
14 know this because you have seen them?

15 MS. STEINGART: And I know because I have  
16 seen them.

17 MR. BREWER: Yes.

18 SPECIAL DISCOVERY MASTER JAMES: When did  
19 the Hylland and Fresia depositions take place?

20 MS. STEINGART: Mr. Hylland's deposition  
21 was May 2nd and Mr. Fresia's deposition was April 30.

22 SPECIAL DISCOVERY MASTER JAMES: Okay.

23 MR. BREWER: So we have excerpts from the  
24 Fresia transcript in our reply papers. I believe our

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1 the topics covered. We know that it's voluminous and  
2 has three volumes outside of having seen it. And we  
3 know the character of the documents that are attached  
4 outside of having seen it because there are these  
5 other documents that reference it.

6 I have part of the transcript from  
7 Mr. Hylland's deposition and I asked him about it and  
8 then Mr. Pizzurro voir dire'd him on the document and  
9 questioned him about whether gee, you saw it but were  
10 you supposed to keep it? Maybe you were supposed to  
11 return it. Well, I don't think that a quick look by  
12 an adversary makes something that's privileged to  
13 begin with and then revealed, then privileged again  
14 because you took it back. At the end of the day they  
15 didn't take it back. His lawyer has it. And even if  
16 he had taken it back, it wouldn't have made a  
17 difference.

18 Just so that -- we didn't have this when  
19 we filed our brief. This is just the excerpt.

20 Do we have additional copies of the  
21 excerpts?

22 MR. BREWER: I think we do. I'm hoping  
23 these are the same pages.

24 MS. STEINGART: It's 173 and beyond of the



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1 deposition.

2 SPECIAL DISCOVERY MASTER JAMES: Can I  
3 have a minute to look at this?

4 MS. STEINGART: Oh, sure.

5 SPECIAL DISCOVERY MASTER JAMES: Thank  
6 you.

7 MS. STEINGART: So I guess, in essence,  
8 what we're asking for in terms of this item is, one,  
9 for Hylland to be determined to be not privileged and  
10 certainly it would impact the scope of what we would  
11 commence doing when we leave here since the Hylland  
12 report is three of the six volumes of material.

13 Second, that the other materials listed in  
14 the documents that we've provided to NorthWest, the  
15 ones they haven't withdrawn but they have had a chance  
16 to think about, for them to indicate why those are  
17 still privileged, for them to consider the materials  
18 that we have identified from the subsequent privilege  
19 logs and for them to represent to us at some point  
20 whether there are other government agencies at all  
21 that have received these materials, government  
22 agencies, state or federal, or regulatory bodies; and,  
23 lastly, to reconsider items on the log where there's  
24 no designation of a third party but it's not apparent

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1 document. They have used the document. We have  
2 withdrawn our request that they replace or destroy or  
3 return it, so that the Fresia one-page document is not  
4 an issue.

5 SPECIAL DISCOVERY MASTER JAMES: Okay.

6 MR. PIZZURRO: Mr. Hylland -- it's  
7 interesting because we really haven't had an  
8 opportunity to argue this or brief this in any way,  
9 but listening, and I'm sure that Ms. Steingart's  
10 recitation of the case law or summation of the case  
11 law is accurate, but I think what makes it clear is  
12 based on what the facts are here the Hylland report is  
13 attorney-client privilege and the privilege has not  
14 been waived.

15 Mr. Hylland was provided a copy of the  
16 report -- and these are facts which we can establish  
17 and if additional submissions are needed, I'm happy to  
18 do it -- Mr. Hylland was provided a copy of the report  
19 on the 28th of April 2003. He was provided that  
20 report, along with all of the other members of the  
21 board because the report was to be considered at a  
22 special meeting of the board that had been called for  
23 I believe it was May 6th or May 7th to consider  
24 whether or not Mr. Hylland would be terminated for

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1 from the face of it that it's to or from a lawyer.

2 SPECIAL DISCOVERY MASTER JAMES:

3 Mr. Fetzer, could I have that read back, please, the  
4 last part about what she would like, what  
5 Ms. Steingart would like?

6 (The reporter read back as requested.)

7 SPECIAL DISCOVERY MASTER JAMES: Anything  
8 else?

9 MS. STEINGART: That's all.

10 SPECIAL DISCOVERY MASTER JAMES: Thank  
11 you.

12 Mr. Pizzurro.

13 MR. PIZZURRO: All right. Let me deal  
14 with these I guess in the order they were presented.

15 First of all, the document that comes out  
16 of Mr. Fresia's deposition, Mr. Fresia testified that  
17 this was a time line that he had prepared. He turned  
18 it over to the company. It was designated as  
19 confidential and put on the privilege log because it  
20 was an exhibit to the Hylland report. However, other  
21 iterations of it were produced because no one looking  
22 at this, and I agree, could determine that that either  
23 was privileged or was an appendix to the report or  
24 anything else. We have withdrawn -- they have the

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1 cause.

2 Mr. Hylland on that day was both an  
3 officer and director of the company. The following  
4 day, either the 29th or the 30th, he resigned as an  
5 officer. He did not resign as a director until the  
6 1st of May. Under the terms of his employment  
7 agreement, he had a right to be at and participate in  
8 the board meeting which would determine whether or not  
9 he should be terminated for cause. And he was  
10 provided, as all the other board members were, with  
11 the special report so that he could effectively defend  
12 himself and participate in that meeting, although I  
13 believe the terms of the employment agreement did not  
14 provide or provides that he does not have a right to  
15 vote on his own termination for cause.

16 But the point is under the case law that  
17 we just heard clearly this is not a waiver of the  
18 privilege. He was a member of the board. It was  
19 prepared for the board. He had a right as a member of  
20 the board to that report. He had a right as a member  
21 of the board to appear and participate in the board  
22 meeting which was specifically called to consider the  
23 report.

24 So from what we've just heard, there isn't

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1 any waiver of the privilege because the report and its  
2 appendices were provided to Mr. Hylland.  
3 Let me try to deal with, if I can recall  
4 or remember all of them, the additional documents  
5 which I believe we started out with 257, 258 that were  
6 in dispute and had certain things not happened this  
7 probably -- the ordinary course in my experience is  
8 when people have a dispute as to whether or not a  
9 document which is listed on a privilege log ought to  
10 belong on the log, there is some give-and-take and  
11 negotiation and you try to work it out. We have  
12 reviewed the 258. We have determined that 211 of  
13 those were not properly on the privilege log and we  
14 turned them over and they have them.  
15 As to the remaining documents, we have  
16 asserted the privilege, and I believe there is writing  
17 back and forth on this. The basis for the privilege  
18 is that the privilege was not waived because there  
19 were third parties that are referenced on it because  
20 these are cases in which there is one of two  
21 exceptions that would apply. Either the third parties  
22 are accountants and the communications were to  
23 facilitate the giving of legal advice because there  
24 were lawyers involved or the third parties were

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1 effectively agents of the company and were provided  
2 with the advice as agents and, therefore, having been  
3 provided with it doesn't constitute a waiver.  
4 SPECIAL DISCOVERY MASTER JAMES: Because  
5 of common interest?  
6 MR. PIZZURRO: Well, because essentially  
7 it's like --  
8 SPECIAL DISCOVERY MASTER JAMES: An  
9 employee.  
10 MR. PIZZURRO: An employee, exactly.  
11 Now, the only way it seems to us that you  
12 can determine whether those are proper or not is if  
13 you review the documents and, as we said in our  
14 letter, we have copies of all of those 47 for you to  
15 take a look at and you can make a determination, which  
16 obviously is binding on the parties, as to whether or  
17 not the privilege is properly asserted with respect to  
18 each and any one of the 47.  
19 The last issue, which we will undertake to  
20 determine whether any documents -- I'm unaware of  
21 any -- we'll undertake to determine whether any  
22 documents may have been turned over to other  
23 government regulators. Like I said, I'm not aware  
24 that that is the case, but I will undertake to

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1 double-check on that.  
2 What I don't understand is the last  
3 request because if we're being asked to reconsider the  
4 assertion of privilege with respect to things on the  
5 privilege log where it is not apparent that a lawyer  
6 was involved in the communication -- I think if  
7 counsel has questions, which is what the 258 were, if  
8 they say document number 17 over here doesn't look  
9 like it ought to be privileged, fine, we'll undertake  
10 to take a look at it. We will make a determination.  
11 If we want to stand on the privilege, then we will  
12 provide it to you.  
13 But I don't think it's our job to go  
14 through the privilege log and try to figure out where  
15 they might think that they have a problem.  
16 SPECIAL DISCOVERY MASTER JAMES: Yes. On  
17 that point you're not saying, are you, that -- well,  
18 maybe you are -- that the attorney-client privilege  
19 does not apply to a situation where non-lawyers may be  
20 communicating?  
21 MS. STEINGART: I think that the  
22 attorney-client privilege does not apply to that  
23 situation, unless they are -- no. No. Unless there  
24 is some other indicia that the communications are for

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1 the purpose of obtaining legal advice.  
2 SPECIAL DISCOVERY MASTER JAMES: What did  
3 the description say on the log?  
4 MR. BREWER: There are a few examples on  
5 this chart we passed around, if that would be helpful.  
6 One is 349; another is 713. I mean, there were some  
7 other things on the log where they said, you know,  
8 non-lawyer A sent an e-mail to non-lawyer B and it was  
9 described as forwarding legal advice received from  
10 Paul, Hastings, whatever, and those we did not, those  
11 we did not challenge.  
12 SPECIAL DISCOVERY MASTER JAMES: Right.  
13 Okay.  
14 MS. STEINGART: We'll take it upon  
15 ourselves if we have not identified those to identify  
16 those for your consideration.  
17 MR. PIZZURRO: Okay. Then we will do the  
18 same exercise we did with respect to the 258 that you  
19 had identified.  
20 MS. STEINGART: Okay.  
21 SPECIAL DISCOVERY MASTER JAMES: All  
22 right. On that point, and this troubles me, a little  
23 but not much, because these things happen in complex  
24 litigation. Let's put some time parameters on that

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1 because we want to move forward, we want to keep this  
2 thing on schedule as much as we can.

3 How long will it take you to go through  
4 the log and identify those? Can you do it over the  
5 weekend is what I am asking, Mr. Brewer? No. I'm  
6 just teasing.

7 MR. PIZZURRO: But just a little bit.

8 MR. BREWER: Well, we have already had a  
9 couple of things put on our agenda for the very near  
10 term. We have taken a first, for this I think we have  
11 taken -- what we have already given them in terms of  
12 items in dispute is the result of a pretty thorough  
13 first pass through a very lengthy log, so we would be  
14 doing some cleanup, a second round, for want of a  
15 better word.

16 MS. STEINGART: So hopefully by a week  
17 from today if there's anything additional we would  
18 have it.

19 If that's acceptable?

20 SPECIAL DISCOVERY MASTER JAMES: Yes

21 MR. PIZZURRO: I just want to understand.  
22 Is this (indicating) what you're referring to? These  
23 are the documents that you on the supplemental logs  
24 are asking about?

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1 MS. STEINGART: Right.

2 MR. PIZZURRO: Is there any other universe  
3 of documents outside of the 258 others that we have  
4 discussed that you're talking about?

5 MS. STEINGART: No, not yet. I will do  
6 the final scrub. That will be in a week.

7 MR. BREWER: Yes. And that was not in our  
8 original list. We just had not gotten to that by the  
9 time we were filing the motion. That's the reason  
10 that's not on the main list.

11 SPECIAL DISCOVERY MASTER JAMES: All  
12 right. So the end of next week, Friday, will also be  
13 the day on which you provide to, Magten provides to  
14 NorthWestern by letter any indication of other  
15 documents on the privilege log as to which there's no  
16 apparent indication that they're privileged and asking  
17 them to review them and to respond.

18 When can you respond?

19 MR. PIZZURRO: We can respond within a  
20 week of the notice.

21 SPECIAL DISCOVERY MASTER JAMES: Okay. So  
22 we're looking at -- let's see. Today is the 18th.  
23 The 25th. That would be --

24 MS. DELANEY: June the 1st.

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1 SPECIAL DISCOVERY MASTER JAMES: -- June  
2 the 1st.

3 MS. STEINGART: Yeah. That's June 1st,  
4 that Friday.

5 MR. PIZZURRO: I assume. I'm taking your  
6 word for it.

7 MS. COUNIHAN: It is. June 1st is a  
8 Friday.

9 MS. STEINGART: June 1st is the Friday.

10 SPECIAL DISCOVERY MASTER JAMES: All  
11 right.

12 I may want to revisit that date once we go  
13 through everything else because this relates to  
14 depositions, but let's go forward.

15 MR. PIZZURRO: Can I make an observation?  
16 It's only an observation.

17 SPECIAL DISCOVERY MASTER JAMES: Yes.

18 MR. PIZZURRO: All right. We've agreed to  
19 do this and we will do it, but this is a review of a  
20 privilege log which they have now had since March 23  
21 and I'm not going to make an argument that they have  
22 waived the right having made the demands that they  
23 have and made the motions that they have. I'm not  
24 going to make that waiver argument, but it seems to me

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1 it's difficult to find a colorable argument that there  
2 was any waiver of any privilege by virtue of a  
3 privilege log being submitted a few days late on a de  
4 minimis number of documents and then to allow or to  
5 have a situation where all of this additional time has  
6 been given to review and to dispute some of the  
7 entries on the log. It's an observation. We'll do --

8 SPECIAL DISCOVERY MASTER JAMES: Duty  
9 noted.

10 Anything else on this issue?

11 MS. STEINGART: One thing that -- well, I  
12 would like to respond slightly to Hylland, but there  
13 is a tranche of documents that I did forget to note  
14 and that is something that there has been a lot of to  
15 and fro about and those are --

16 SPECIAL DISCOVERY MASTER JAMES: When you  
17 say, "tranche," is that a fancy word for group?

18 MS. STEINGART: Group. A group of  
19 documents. And that refers to the ones that are  
20 claimed as privileged because of a 408 privilege.

21 SPECIAL DISCOVERY MASTER JAMES: Right.

22 MS. STEINGART: And I think that there are  
23 two levels to that analysis. First of all, 408 is not  
24 a privilege that precludes discovery. It's only a

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1 privilege -- it only has to do with the admissibility  
2 at trial and then admissibility at trial only for  
3 certain purposes. Certainly they can be used for  
4 impeachment and other things. That's number one.

5 The other level -- so there is no  
6 privilege. The argument that NorthWestern makes about  
7 these documents is that well, they're not relevant.  
8 And I think on that account there are a number of  
9 factors that undercut that. First of all, these  
10 documents are within the documents this Court has  
11 already ordered to be produced. They're on the  
12 privilege log because there's already been a  
13 determination, there's been a narrowing of our  
14 document request to certain items and those items were  
15 found to be within the realm of relevance and the  
16 realm of documents that were required to be produced,  
17 so that the relevance argument is over. It was made  
18 last time. There was a narrowing. There was an order  
19 for production. And so certainly we can't resist  
20 production at this point on the grounds of relevance.

21 SPECIAL DISCOVERY MASTER JAMES: And when  
22 you say, "we," you mean NorthWestern?

23 MS. STEINGART: Right. Or they. I'm  
24 sorry. They.

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1 So under 408 there's no relief from the  
2 requirement for it to be produced because it's not a  
3 privilege that's cognizable under these circumstances.

4 Number two, there's no relief because  
5 they're not relevant because they have already been  
6 determined to be relevant.

7 And, lastly, I think because since that  
8 argument we have the cease and desist and we have all  
9 these complaints that deal with the CFO, the CEO, the  
10 COO, the controller, we see that the substance and  
11 scope, that all of the items in the SEC investigation  
12 were themselves relevant because each of the findings  
13 establish the overall fact that the financials for  
14 NorthWestern as a whole in each quarter during this  
15 entire year were false.

16 So I think that at this point the Rule 408  
17 objection is not well-taken and whether these  
18 documents will be admissible for some purpose down the  
19 road is still an open question, but I do think that  
20 they need to be produced and that there's no grounds  
21 for not producing them.

22 With respect to --

23 SPECIAL DISCOVERY MASTER JAMES: Let me  
24 interrupt you on that.

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1 I believe I recall seeing in  
2 NorthWestern's papers an argument -- and maybe I'm  
3 wrong on this -- that you have a heightened burden in  
4 trying to or in asking for the production of  
5 settlement documents as opposed to other relevant  
6 documents.

7 MS. STEINGART: Well, I think here since  
8 we already have evidence that the SEC has considered  
9 the financials to be systematically and intentionally  
10 false that whatever the discussions there were as to  
11 the scope and tenor of what the findings would be, of  
12 what the admissions would be, of what the SEC was  
13 asking and what the company was offering, I think that  
14 those are relevant and in a very -- it goes to the  
15 heart of what the fraud was and what the company  
16 itself acknowledges is the fraud.

17 SPECIAL DISCOVERY MASTER JAMES: Well,  
18 then, to what extent -- this always comes up, the  
19 settlement documents. To what extent is it going to  
20 add anything to what you already have? Why should we  
21 invade -- I mean, settlement documents are  
22 traditionally accorded a higher protection than other  
23 documents. That's obviously why you have Rule 408.  
24 And I don't know exactly, and maybe you

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1 can help me on this, tell me what kind of settlement  
2 documents we're talking about. What are they going to  
3 add to your fund of knowledge which you don't already  
4 have? I mean, I have seen the exhibits attached to  
5 your briefs that show the pleas and whatnot. You have  
6 a lot of power stuff there.

7 So, first of all, tell me what settlement  
8 documents are you talking about and, secondly, what  
9 are they going to add to this that you don't already  
10 have?

11 MS. STEINGART: Well, the settlement  
12 documents I'm talking about are the ones that they  
13 have listed on the privilege log.

14 SPECIAL DISCOVERY MASTER JAMES: How many  
15 documents are there?

16 MR. BREWER: Eight or ten, a dozen,  
17 something like that.

18 SPECIAL DISCOVERY MASTER JAMES: And  
19 they're identified as privilege with 408?

20 MR. BREWER: It says 408 in the column  
21 where you would expect it to say attorney-client or  
22 work product or whatever.

23 SPECIAL DISCOVERY MASTER JAMES: Right.

24 MS. STEINGART: And part of it is that we



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1 don't even have -- I don't know if this is because you  
2 do a 408 thing. But we don't even have the consent  
3 decree signed by the company in connection with the  
4 cease and desist. That can't be -- there can't be any  
5 basis for withholding that and withholding the terms  
6 and conditions of the consent.

7 That's number one.

8 SPECIAL DISCOVERY MASTER JAMES: Well, is  
9 that one of the documents listed?

10 MR. PIZZURRO: No.

11 MR. BREWER: I don't believe that is --  
12 I'm not sure if that one is logged.

13 MS. DELANEY: No.

14 MR. BREWER: I'm not sure there is a  
15 timing issue there in terms of when they did the  
16 settlement and when they did the log, but I'm not sure  
17 if that one is logged.

18 MS. STEINGART: We have asked for it a  
19 number of times and we have been refused on the basis  
20 of some confidentiality privilege, and I don't know  
21 what it is.

22 SPECIAL DISCOVERY MASTER JAMES: We'll let  
23 them address that in a minute.

24 MS. STEINGART: 408, 408 does not create a

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1 to some extent we need to depose the individuals  
2 against whom the complaints were brought.

3 So I think that this really reinforces  
4 that this provides us with actual admissions by the  
5 company to the extent that the company does or decides  
6 that it may take the position that the material in the  
7 cease and desist is something that it still has the  
8 flexibility to admit or deny.

9 I think that these are a limited number of  
10 documents. They can be marked for attorneys' eyes  
11 only so that they don't get currency or circulation  
12 that is beyond any necessary group so that whatever  
13 permitted use of it will be made and non-permitted  
14 uses will not be open to abuse.

15 So I think that we can have, given the  
16 structure of our confidentiality agreement, protection  
17 here, a limited universe of documents and, again, this  
18 is not a production privilege.

19 MR. BREWER: There are only eight  
20 documents on their log where they give the basis as  
21 Rule 408 rather than something else.

22 SPECIAL DISCOVERY MASTER JAMES: Thank  
23 you.

24 Mr. Pizzurro.

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1 heightened level for, I disagree for --

2 SPECIAL DISCOVERY MASTER JAMES: For  
3 discovery purposes?

4 MS. STEINGART: -- discovery. It just  
5 creates an obstacle for admission at trial. These are  
6 the kinds of documents that are used for impeachment  
7 all the time.

8 Also, there have been certain positions  
9 taken by -- first of all, some of the witnesses have  
10 pleaded the Fifth and in connection with using the  
11 evidentiary assumption or the evidentiary burden that  
12 we might be able to avail ourselves of having other  
13 corroborating material is helpful. The flow of  
14 negotiations between the company and the SEC  
15 concerning this will give us what the company's  
16 admissions and positions are with respect to possibly  
17 a number of issues in the cease and desist and the  
18 process, what the company was telling the SEC about  
19 who they could deliver and what they could say,  
20 especially in light of people taking the Fifth.

21 There may be, and I don't know, some  
22 resistance with respect to the SEC complaints about  
23 whether there's no admitting or denying that the SEC  
24 complaints themselves establish fraud and that's why

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1 MR. PIZZURRO: Yes.

2 SPECIAL DISCOVERY MASTER JAMES: Let me  
3 ask you first. There are eight documents. What are  
4 they?

5 MR. PIZZURRO: Well...

6 SPECIAL DISCOVERY MASTER JAMES: You don't  
7 know off the top of your head?

8 MR. PIZZURRO: Off the top of my head I  
9 don't know.

10 SPECIAL DISCOVERY MASTER JAMES: I mean,  
11 they are all settlement documents.

12 MR. PIZZURRO: I believe it's  
13 correspondence. That's my recollection, but I'm  
14 not -- I honestly don't want to make a representation  
15 for sure.

16 SPECIAL DISCOVERY MASTER JAMES: Okay.

17 MR. BREWER: They're all described as  
18 settlement letter re: something or other on the log.

19 SPECIAL DISCOVERY MASTER JAMES: Okay.

20 MR. PIZZURRO: Start with the proposition  
21 that indeed the law is that where you are attempting  
22 to get 408 material there is a heightened burden on  
23 the party requesting it and they have to show that  
24 there is a special need.



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1 Now let's talk. So the relevance issue  
2 sort of does become, again, something that needs to be  
3 talked about. We went through this, and I'm not going  
4 to spend a lot of time on it because we went through  
5 it very exhaustively the last time we were all  
6 together in January, but I'm sure -- I'm not sure.  
7 You may recall that among the arguments I was  
8 making --

9 SPECIAL DISCOVERY MASTER JAMES: Don't say  
10 sure.

11 MR. PIZZURRO: You may recall among the  
12 arguments that I was making at the time is that as far  
13 as we knew, there was absolutely nothing that the SEC  
14 was looking at that had anything to do with the  
15 transaction at issue in this case, these plaintiffs,  
16 anything to do with this case, nothing.

17 Now that's clear. It is clear. The cease  
18 and desist order, the complaints against the  
19 individuals, going flat transaction, sale of Montana  
20 Power Company assets, QUIPS holders, nothing to do  
21 with anything here. It's completely irrelevant and  
22 they haven't been able with one witness to link up any  
23 of this to the transaction.

24 So you talk about special need. We are

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1 way out in left field here. I really find it very  
2 difficult. We hear about there was this fraud and we  
3 keep hearing about fraud in the air. I believe that  
4 if we're going to have any anchor at all in this case  
5 and in the process that anchor has got to be in the  
6 claim that has been asserted here. And there is  
7 simply absolutely no connection between anything that  
8 the SEC was looking at as near as anybody can tell  
9 from the public documents that the SEC has put out  
10 there. And all the indictments -- indictments is  
11 wrong. All of the complaints and the settlements with  
12 the individuals and the cease and desist order with  
13 the company, there's just nothing, absolutely nothing.

14 So there isn't any expectation that would  
15 be reasonable. I'm not making a representation  
16 obviously as to what's in the documents that we have  
17 withheld on this ground, but I don't think that these  
18 plaintiffs can even begin to make the kind of showing  
19 that they would have to make under 408 where they  
20 can't even show based on now they have got everything  
21 They made their relevance argument last time. You  
22 ruled on it. We turned it over.

23 The SEC, the last time we were together  
24 the cease and desist was not finalized by the

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1 Commission. It wasn't available to the world. It is  
2 and what is now clear, which we couldn't make clear at  
3 the last time we were all together, is for sure  
4 nothing the SEC was looking at had anything to do with  
5 this case or this transaction.

6 So I think --

7 SPECIAL DISCOVERY MASTER JAMES: Let me  
8 see if I understand you. You're saying the cease and  
9 desist has nothing to do with this case?

10 MR. PIZZURRO: Nothing to do with this  
11 case.

12 SPECIAL DISCOVERY MASTER JAMES: Is it a  
13 public document?

14 MR. PIZZURRO: It is.

15 SPECIAL DISCOVERY MASTER JAMES: Can they  
16 get it independently?

17 MR. PIZZURRO: They have it. They have it  
18 and they have examined witnesses --

19 MS. STEINGART: Not the consent. Not the  
20 consent that they signed with the SEC in order to  
21 resolve the cease and desist order.

22 SPECIAL DISCOVERY MASTER JAMES: We'll get  
23 back to you on that in a minute.

24 MR. PIZZURRO: If there's some additional

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1 document, I mean we can probably resolve that issue.

2 SPECIAL DISCOVERY MASTER JAMES: Now, the  
3 408 documents that --

4 MR. PIZZURRO: But that's not the 408.

5 That's not what I have in mind. It's not what's on  
6 our privilege log in terms of 408.

7 If there's some other document pursuant to  
8 which the company agreed to the terms of the cease and  
9 desist or otherwise agreed to resolve this, I'm going  
10 to go back and if I find it I'm going to undertake to  
11 advise my client that it should be produced. That  
12 would be my advice to them. What position is taken, I  
13 can't tell you.

14 But what I am saying is that what the SEC,  
15 what is very apparent from the SEC's own documents,  
16 the cease and desist order and all of the complaints  
17 against the four individuals, is that the going flat  
18 transaction is completely irrelevant. It has nothing  
19 to do with any of this. It is entirely, as I said the  
20 last time we were here, an investigation concerning  
21 the company's financial reporting as it related to its  
22 subsidiary Expanet and Blue Dot and some subsidiary  
23 issues. And the idea that there has been a revelation  
24 that the company's financial statements for the first

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1 three quarters of 2002 is now new, the company  
2 restated its financials in April '03. By definition  
3 they were wrong. By definition they were materially  
4 false. Okay?

5 And now the SEC has done an investigation  
6 to determine the facts and circumstances behind that  
7 to see what kind of liability or responsibility that  
8 there is and it is what it is, but it has nothing,  
9 nothing to do with this transaction.

10 So why am I saying that? Why is that  
11 relevant? It's relevant to this argument because they  
12 have an obligation to show special need with respect  
13 to these settlement materials. They can't even show  
14 that the underlying settlement agreement, if you will,  
15 the cease and desist order, is relevant to their case.  
16 How are they going to meet the special need  
17 requirement to show that some underlying  
18 communications with the SEC that led to the settlement  
19 has anything to do with the case?

20 SPECIAL DISCOVERY MASTER JAMES: Well  
21 it's been, as you say, a couple of, several weeks  
22 since we have addressed this before, but I thought  
23 their theory of the going flat transaction was that  
24 NorthWestern failed to disclose at the time of the

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1 transaction the improper accounting numbers, the  
2 improper or the inaccurate, their inaccurate, the  
3 inaccuracies about the financial condition and as a  
4 result they were, Magten and the trustee were misled  
5 or defrauded because they would have done something if  
6 they had known that information.

7 Now, clearly the admissions to me, if my  
8 recollection is correct, that all these financial  
9 problems are relevant and to the extent the consent  
10 decree relates to that, that seems to be relevant.  
11 But tell me if I'm misunderstanding this.

12 MR. PIZZURRO: The theory -- let me tell  
13 you the theory that's pled and let me tell you the  
14 theory that I've heard articulated, which isn't  
15 anywhere other than in some transcripts.

16 The theory that is pled which was in the  
17 amended complaint, which is after Judge Case, the  
18 bankruptcy judge, effectively said you're not  
19 creditors of Clark Fork and so you can't assert a  
20 fraudulent conveyance claim, is that the indenture  
21 trustee, not these QUIPS holders who bought their  
22 QUIPS months after the restatement, months after all  
23 the problems, Magten was not defrauded by anyone, nor  
24 was this indenture trustee who is the replacement to

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1 The Bank of New York, who was the indenture trustee.  
2 The indenture trustee signed off on a document which  
3 effectively, the judge held as a matter of law,  
4 released Clark Fork as the obligor on these  
5 instruments and replaced that obligor with  
6 NorthWestern.

7 SPECIAL DISCOVERY MASTER JAMES: Right

8 MR. PIZZURRO: And the allegation in the  
9 complaint is that Bank of New York was induced to  
10 execute that document or documents based on fraudulent  
11 financials. Okay?

12 So what does that mean? In terms of, in  
13 terms of whether the financials were false or not, as  
14 I was arguing the last time we were here, that's  
15 really not an issue because of the restatement. The  
16 underlying facts and circumstances of why they were  
17 false, unless the SEC were actually investigating the  
18 use of the financials in connection with this  
19 transaction, which they were not, is completely  
20 irrelevant. And now we know that The Bank of New  
21 York, whose deposition was taken and whose  
22 representatives testified, they didn't look at the  
23 financials because they didn't care.

24 And, furthermore, there is now a decision

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1 by Justice Freed --

2 SPECIAL DISCOVERY MASTER JAMES: Which  
3 I've read.

4 MR. PIZZURRO: -- which makes it clear  
5 that Bank of New York had no obligation to even care  
6 at that time or a subsequent time. So the theory as  
7 pled has nothing to do with any fraud on these  
8 plaintiffs. It has to do with vitiating the  
9 underlying release and as pled I'm pretty confident  
10 that that theory isn't going anywhere anymore.

11 Now, we have also heard a theory which has  
12 never been articulated in any pleading, so I don't  
13 really know what effect it has, but I'll give counsel  
14 due for having to expressed it, and as I understand it  
15 that is some theory that there was a fraud here  
16 because at the time that NorthWestern assumed these  
17 obligations it knew that it didn't have the financial  
18 wherewithal to pay the obligations.

19 Again, you can argue back and forth all  
20 day long, but as to whether that's true and whether  
21 there's any evidence of that, I don't see any yet.  
22 But that has nothing to do with the SEC's  
23 investigation and that has nothing to do with --  
24 unless the SEC had made some finding that the company

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1 was insolvent or unable to meet its obligations as  
2 they became due sometime during this period when the  
3 transaction was done, the investigation would have no  
4 relevance and, indeed, there isn't anything in the  
5 report to that effect.

6 So why we are fixated -- we have spent a  
7 lot of time and a lot of money. It is what it is.  
8 We're going to have some more depositions and we're  
9 going to have -- but at the end of the day all of this  
10 has been leading nowhere. They have got a lot worse  
11 case today than they did the last time we were all  
12 together before they got this stuff.

13 My point is I don't see how they can  
14 possibly under the circumstances and given what we  
15 know the SEC said and investigated, and there isn't  
16 any dispute as to what they said or investigated, they  
17 can show some heightened need to get the 408 material  
18 They can't even show -- if they had this to do all  
19 over again, if we had the benefit of the SEC's cease  
20 and desist order back in January, I'm pretty confident  
21 Your Honor might have had a different view of all of  
22 the documents that they were asking for and that you  
23 allowed them to get. That's water over the dam.  
24 That's fine.

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1 But it is a different ball game today and  
2 I just don't see how they can make the showing that  
3 they're required to make. And, again 408, is it  
4 technically a privilege? No, it's not. But they do  
5 have under the case law the heightened burden. We put  
6 it on the log and we specifically had it as 408 in  
7 part because it was an issue that we flagged the last  
8 time we were here and you said put it on the log so  
9 we'll sort it out another day and that's what we're  
10 here to do today.

11 SPECIAL DISCOVERY MASTER JAMES: Okay

12 MS. STEINGART: Well, you know, we hear  
13 every time we're here about what Mr. Pizzurro would  
14 like this case to be about, but it's not what this  
15 case is about.

16 Judge Farnan issued a decision in denying  
17 the motion to quash that says, and which Judge Farnan  
18 held --

19 SPECIAL DISCOVERY MASTER JAMES: Quash  
20 against whom?

21 MS. STEINGART: A protective order for  
22 discovery here where this argument, this specific  
23 argument was made, and in response what Judge Farnan  
24 said in his opinion was, quote, "Judge Case's language

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1 does not condition plaintiffs' standing to sue  
2 NorthWestern on whether The Bank of New York relied on  
3 NorthWestern's financial statements. Rather, Judge  
4 Case noted that the essence of plaintiffs' fraud  
5 argument was that NorthWestern engaged in a knowing  
6 and conscious fraudulent scheme. In light of this  
7 characterization, Judge Case determined that the  
8 relevant inquiry is whether Debtor knew at the time  
9 that it could not do the transaction based on its  
10 restated accountings, et cetera and whether the  
11 financial information the Debtor provided the public  
12 was, in fact, false."

13 Now --

14 MR. PIZZURRO: Can you keep reading  
15 though, Bonnie? I mean, please.

16 MS. STEINGART: This is Judge Farnan's  
17 opinion. Bank of New York stated during its  
18 deposition that it did not look at the financials, but  
19 if it knew at the time that all of the financials that  
20 were publicly issued and outstanding for NorthWestern  
21 was false, it would not have done what it had done.  
22 It would not have signed the release and it would not  
23 have gone forward with the transaction. That's what  
24 Bank of New York testified to during the deposition.

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1 They said they didn't look at the  
2 financials, but if the day before they had to sign the  
3 release it was disclosed that NorthWestern had filed  
4 three false 10-Q's that misstated NorthWestern's  
5 consolidated income by 600 percent that they would  
6 have been on inquiry notice and they would have made  
7 such inquiry.

8 SPECIAL DISCOVERY MASTER JAMES: That's a  
9 deposition in this case?

10 MS. STEINGART: At a deposition in this  
11 case.

12 SPECIAL DISCOVERY MASTER JAMES: How does  
13 that relate -- I mean was that testimony provided to  
14 the State Supreme Court in New York before the  
15 decision was made?

16 MS. STEINGART: No. No, it was not  
17 because that deposition occurred after, after that  
18 decision was rendered or while or at the same time.  
19 They were probably hours apart.

20 MR. KAPLAN: Also, there was an agreement  
21 because discovery was stayed in the state court, in  
22 the state court action so they agreed to have  
23 discovery proceed in this litigation, but it wasn't  
24 going to be used in the state court litigation. So

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1 there was a timing issue, but we also had to agree  
2 with them that it was limited to this case.  
3 MS. STEINGART: And so also Mr. Pizzurro  
4 is very cavalier in saying it was false and we said it  
5 was false, we withdrew them and we stated that it was  
6 false.

7 But the issue here, besides that they were  
8 false, they were intentionally false and that's what  
9 the key of these findings are. It wasn't that  
10 somebody said oh, my gosh, I made a mistake; oh, my  
11 gosh, the accounting rules changed; oh, my gosh,  
12 somebody got sick and we didn't find this pile of  
13 documents.

14 What the SEC found was that there was a  
15 systematic, consistent, intentional fraud and that  
16 fraud went on because unless the financials were  
17 false, the company could not do its equity offering,  
18 could not replace that 720 million in bonds and could  
19 not effectuate. The SEC didn't address the going flat  
20 transaction because that was not a transaction that  
21 was -- that was a private transaction and not a public  
22 transaction. But there's no doubt about that the  
23 representations that were made to the rating agency  
24 and to others about the health of this company, about

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1 the cash flow of this company in order that  
2 transaction should occur.

3 So the tale that Mr. Pizzurro spins about  
4 what he would like this case to be about and the  
5 firewall that he would like to erect between the  
6 damaging information that has emerged and the going  
7 flat transaction is a wall that is impossible to  
8 build.

9 The more information and data we have that  
10 show that the company knew that its financials were  
11 false, knew that it had to withdraw them, knew that  
12 without issuing the false financials it could not  
13 engage in the capital transactions it did during 2002,  
14 the stronger our case is to do what Judge Case said we  
15 had to do, would be to show --

16 SPECIAL DISCOVERY MASTER JAMES: Judge  
17 Farnan or Judge Case?

18 MS. STEINGART: Judge Case that Judge  
19 Farnan then said that this is the issue, a knowing and  
20 conscious fraudulent scheme. Any such fraudulent  
21 scheme that materially misstated the financials during  
22 the time of the going flat transaction necessarily  
23 implicated whether that transaction would occur. And  
24 Mr. Pizzurro's need to say no, it doesn't, no, it

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1 doesn't because the SEC doesn't say going flat does  
2 not make it so.

3 SPECIAL DISCOVERY MASTER JAMES: Okay  
4 I've heard enough excellent advocacy on this issue.  
5 Here's what I'm going to do.

6 I'm going to revisit -- well, first of  
7 all, before I forget it, I would like an affidavit  
8 from you with respect to the Hylland matter which we  
9 do not have in the record anywhere, if you could get  
10 that to me by next Wednesday.

11 Secondly, with respect to the schedule for  
12 determining what the universe of contested privilege  
13 documents is which I may then have to review, I'm  
14 going to push back the dates on that. It sounds from  
15 what Mr. Brewer said and also based on the time that  
16 you have had the privilege log that it shouldn't take  
17 a week to get that to me. Therefore, I'm going to ask  
18 that the re-review of the log and any supplementation  
19 with respect to the documents that are still in  
20 dispute, which includes the two handouts that I have  
21 been given today by Magten's counsel, should be in the  
22 hands of NorthWestern, the defendants, by 12:00 noon  
23 on Wednesday. And I want a response from defendants  
24 as to whether they want me to look at those documents

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1 or whether they're going to give them up by the close  
2 of business on Friday.

3 Now, with respect to the 408 documents,  
4 when the process is done Friday at close of business  
5 and you decide what you're going to be sending me, I  
6 want to see the 408 documents.

7 Now, does that leave anything that I have  
8 missed?

9 MR. PIZZURRO: I think that the 47  
10 documents --

11 SPECIAL DISCOVERY MASTER JAMES: Include  
12 the 408's?

13 MR. PIZZURRO: No. No. We brought with  
14 us 47 documents as to which we're still asserting the  
15 privilege out of the original 258.

16 SPECIAL DISCOVERY MASTER JAMES: Right. I  
17 don't want it piecemeal. I want you to send them to  
18 me all at once because I'm afraid I will lose track of  
19 stuff.

20 MR. PIZZURRO: Right. So what we would be  
21 sending --

22 SPECIAL DISCOVERY MASTER JAMES: Is the 47  
23 plus any others that --

24 MR. PIZZURRO: Plus whatever else we have



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1 a dispute on, plus the 408.  
 2 SPECIAL DISCOVERY MASTER JAMES: Right.  
 3 MR. PIZZURRO: Got it.  
 4 SPECIAL DISCOVERY MASTER JAMES: Correct?  
 5 MS. STEINGART: All right.  
 6 MS. DELANEY: I wonder just for the sake  
 7 of clarity, since we got two schedules, a letter and  
 8 then an addendum today, that when plaintiffs identify  
 9 the documents in dispute we get one comprehensive list  
 10 of what remains.  
 11 SPECIAL DISCOVERY MASTER JAMES: Sure.  
 12 MR. BREWER: Okay.  
 13 MS. STEINGART: You do have a list of  
 14 that. You have the ones that you haven't withdrawn,  
 15 so that list is complete, that one (indicating).  
 16 MS. DELANEY: Where does (indicating) this  
 17 go?  
 18 MS. STEINGART: And this comes from your  
 19 two supplemental logs.  
 20 MS. DELANEY: So are you going to include  
 21 this on what you give us on Wednesday?  
 22 MR. BREWER: We can do that. We can do  
 23 that in a single document. It seems a little unwieldy  
 24 to have to add back in your -- you already prepared

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1 the list of 51 you're maintaining on.  
 2 MS. DELANEY: So whatever you give us is  
 3 in addition to the 47 that we still continue to assert  
 4 the privilege, correct?  
 5 MR. BREWER: Yes.  
 6 MS. STEINGART: But you're on notice now  
 7 that those will be on the list so you don't have to  
 8 wait.  
 9 MR. BREWER: Whatever we give you on  
 10 Wednesday will be in addition to your list of 47, I  
 11 think you said, that you've indicated you're still  
 12 maintaining privilege on. We already know what those  
 13 are and there's no point in copying that into a  
 14 separate document.  
 15 MS. DELANEY: Thank you.  
 16 MR. BREWER: Okay.  
 17 SPECIAL DISCOVERY MASTER JAMES: And then  
 18 on -- let me see. Next Friday is the 25th.  
 19 On the 29th, Tuesday, the 29th, whatever  
 20 documents are in dispute should be delivered, should  
 21 be in my hands along with the relevant log entries  
 22 relating to those documents.  
 23 MS. STEINGART: Is there anything  
 24 supplemental that you would like from us on Hylland?

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1 SPECIAL DISCOVERY MASTER JAMES: No. I  
 2 mean, I'm going to be getting Hylland. You mean in  
 3 terms of the deposition? No.  
 4 MS. STEINGART: In terms of you asked  
 5 Mr. Pizzurro for an affidavit. Is there anything else  
 6 additional that we can provide to you on Hylland in  
 7 terms of the letter that indicates that the report was  
 8 provided to him and the fact that there was a dispute  
 9 during that period or an analysis of the cases that  
 10 respond to those in the letter that Mr. Pizzurro  
 11 provided to you? Would that be of any help?  
 12 SPECIAL DISCOVERY MASTER JAMES: Yes. Why  
 13 don't you do that on Wednesday as well?  
 14 MS. STEINGART: Thank you.  
 15 SPECIAL DISCOVERY MASTER JAMES: Okay.  
 16 What I would like from local counsel is a letter on  
 17 Monday that memorializes these dates and when things  
 18 are going to be due.  
 19 MS. DUBE: A joint letter you want?  
 20 SPECIAL DISCOVERY MASTER JAMES: Yes.  
 21 This relates solely to paragraph number 5 of my May 17  
 22 letter.  
 23 I don't see any reason, for the benefit of  
 24 Mr. Kaplan, the order of the last four or five

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1 elements doesn't have any particular significance the  
 2 way that I organized the first five, so I'm happy to  
 3 jump to depositions, the issues raised by paragraph 9  
 4 of my letter which states "Plaintiffs' motion to  
 5 exceed the ten deposition limit and to extend the  
 6 discovery schedule for the taking of depositions in  
 7 this action."  
 8 Before I hear from you, Mr. Kaplan, it's  
 9 quite obvious that, first of all, we're beyond the May  
 10 2nd discovery cutoff, so clearly there will be  
 11 depositions taken after today. I'm going to permit  
 12 such depositions to be taken.  
 13 Now, whether I limit that to ten or not is  
 14 another matter and I guess that's what I want to hear  
 15 from you about.  
 16 MR. KAPLAN: Thank you. A couple of  
 17 points that I think are important to set the  
 18 background on this issue.  
 19 The first is that the concept of us  
 20 exceeding the ten deposition limit is not something  
 21 that's new. This is something that we had discussed  
 22 with opposing counsel for a long time and there are  
 23 e-mails and letters that are attached to various  
 24 motions that acknowledge from both sides without any



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1 dispute the fact that we'll likely be exceeding ten  
2 depositions.  
3 When we were here last time I believe that  
4 Your Honor had asked how many depositions we thought  
5 and we gave a rough number of probably twelve to  
6 fifteen. Again, there are letters when we were  
7 discussing scheduling, there are a number of letters  
8 and e-mails from all the counsel on the other side  
9 that acknowledged that the number of depositions would  
10 be more than ten and we're setting schedules for  
11 twelve depositions or so. So this is not a new  
12 request and, in fact, we were under the impression  
13 that we would have a stipulation to the effect of,  
14 number one, extending the time to do depositions and,  
15 number two, to resolve the issue of the number of  
16 depositions to avoid having to come before you today  
17 and deal with this issue.

18 And it was only as the original discovery  
19 cutoff was fast approaching that we learned that there  
20 was not going to be any agreement on extending  
21 depositions and it seemed that all negotiations with  
22 respect to depositions were simply breaking down which  
23 required us to come in and ask to, again, do both. I  
24 understand we have resolved the issue of the

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1 extension, but we still have I think a dispute about  
2 the number of depositions.

3 One of the things that the debtors argue  
4 or that NorthWestern argues in their papers to which  
5 we haven't yet replied is the same theme that  
6 Mr. Pizzurro tried just now, which is well, their case  
7 is over because of his view of what he would like our  
8 case to be and, therefore, you shouldn't let them  
9 continue to go forward because NorthWestern has  
10 convinced themselves of what our case should be and  
11 they have somehow convinced themselves that any  
12 further discovery in this is fruitless.

13 Obviously, based on the decision that  
14 Ms. Steingart read, every judge who has looked at this  
15 so far has come to a totally different conclusion. So  
16 that's number one.

17 Number two --

18 SPECIAL DISCOVERY MASTER JAMES: Number  
19 two for me is how many depositions have been taken by  
20 each side?

21 MR. KAPLAN: So far NorthWestern has not  
22 taken any depositions. Nobody on the other side of  
23 the table have taken any depositions.

24 We have taken five depositions. We have

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1 taken five depositions so far. Of those, there were  
2 several other depositions that had to move as a result  
3 of the document issues that we have been discussing  
4 all morning. If not for the re-calling of the  
5 documents and all the privilege issues, there were  
6 several other depositions and, in fact, the vast  
7 majority of the depositions would have been done.  
8 We had firm dates set for Mr. Hanson, for  
9 Mr. Kindt, for a number of deponents, but because of  
10 these specific document issues we ended up having to  
11 move the depositions because we had NorthWestern and  
12 Mr. Hanson's and Kindt's counsel saying you're only  
13 getting him once without a fight and if we're going to  
14 have to bring him back, we're going to fight you on  
15 it.

16 And our view was well, there are so many  
17 documents, some of them key documents, still in  
18 dispute it wasn't worth trying to take a deposition  
19 with a limited universe of documents, not knowing how  
20 Your Honor would rule on it and then having to come  
21 back again and say gee, now can we have them again?

22 SPECIAL DISCOVERY MASTER JAMES: Are the  
23 five depositions that you have taken, are they  
24 completed without regard to my rulings on the

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1 privilege issues?

2 MR. KAPLAN: Yes, those are. But there  
3 are, however, other depositions. Those are some of  
4 the party ones, Mr. Hanson, Mr. Kindt, we also had a  
5 30(b)(6) deposition of NorthWestern, all of which  
6 were, in essence, in abeyance pending a resolution of  
7 these issues.

8 There are some other depositions that we  
9 have sought that have also been delayed because of  
10 document issues. For example, we sought to take the  
11 deposition of Merle Lewis, who is the former CEO of  
12 NorthWestern. It was originally noticed for April  
13 17th and all of a sudden we ran into all of these  
14 document issues, among other things, that led us to  
15 conclude that it didn't make sense at the time to go  
16 forward with that deposition. So even though it was  
17 noticed for April 17th, we ended up at the time  
18 adjourning that deposition to a date later. We  
19 probably would have had that deposition by now but  
20 with all of the motion practice and everything being  
21 held in abeyance, scheduling on that has stopped.

22 Other depositions that have been out there  
23 have been delayed also for document issues but some  
24 slight differently. For example, one of the